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EDITOR'S NOTE

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PROCEEDINGS AND ORDERS DATE: 121685

CASE NBR 85-1-00188 CFH
SHORT TITLE Kemp, Warden DOCKETED: Aug 1 1985
VERSUS Blake, Joseph J.

Date	Proceedings and Orders
Aug 1 1985	Petition for writ of certiorari filed.
Sep 4 1985	DISTRIBUTED. September 30, 1985
Sep 3 1985	Brief of respondent Joseph J. Blake in opposition filed.
Sep 3 1985	Motion of respondent for leave to proceed in forma pauperis filed.
Oct 7 1985	REDISTRIBUTED. October 11, 1985
Oct 15 1985	REDISTRIBUTED. October 18, 1985
Oct 21 1985	REDISTRIBUTED. November 1, 1985
Nov 4 1985	Motion of respondent for leave to proceed in forma pauperis GRANTED.
Nov 4 1985	REDISTRIBUTED. November 8, 1985
Nov 12 1985	REDISTRIBUTED. November 15, 1985
Nov 18 1985	Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

- 85-188

No. .....

In The

Supreme Court of the United States

October Term, 1984

RALPH KEMP, WARDEN,

Petitioner,

v.

JOSEPH JAMES BLAKE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether the Eleventh Circuit's application of this Court's decision in *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052 (1984) effectively eliminated the prejudice prong of the two prong test for judging ineffective assistance of counsel claims so as to allow prejudice to be presumed from the failure of a criminal defendant's trial counsel to present character evidence during the sentencing phase of a death penalty case?

II.

Whether a federal district court can grant federal habeas corpus relief to a state prisoner on claims which were procedurally defaulted under state law, without making a threshold inquiry as to "cause" and "prejudice" pursuant to this Court's decision in *Engle v. Isaac,* — U.S. —, 102 S.Ct. 1558, 1570-71 (1982)?

III.

Whether the Eleventh Circuit has "fashioned a new constitutional rule" that requires that whenever a state trial court appoints a psychiatrist to determine a criminal defendant's sanity at the time of the offense, the State is under a continuing obligation to provide the psychiatrist, on its own initiative, with any information that might prove to be "psychiatrically significant" on the sanity issue?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Ralph Kemp, respectfully prays that the writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on March 29, 1985.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit is reported in *Blake v. Kemp,* 758 F.2d 523 (11th Cir. 1985) (Appendix A). The decision of the United States Court of Appeals for the Eleventh Circuit denying Petitioner's petition for rehearing and suggestion for rehearing *en banc* was entered on May 13, 1985. (Appendix B). The opinion of the district court granting federal habeas corpus relief to Respondent is

recorded in *Blake v. Zant,* 513 F.Supp. 772 (S.D.Ga. 1981) (Appendix C).

———o———

JURISDICTIONAL STATEMENT

The opinion of the panel of the United States Court of Appeals for the Eleventh Circuit was entered on March 29, 1985 in *Blake v. Kemp,* 758 F.2d 523 (11th Cir. 1985). (Appendix A). A petition for rehearing and suggestion for rehearing *en banc* was denied on May 13, 1985. (Appendix B).

This petition for a writ of certiorari has been timely filed within the allowable 90 days. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

———o———

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Sixth Amendment:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

The United States Constitution, Fourteenth Amendment, Sec. I:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

O.C.G.A. § 9-14-51:

> All grounds for relief claimed by a petitioner for a writ of habeas corpus shall be raised by a petitioner in his original or amended petition. Any grounds not so raised are waived unless the Constitution of the United States or of this state otherwise requires or unless any judge to whom the petition is assigned, on considering a subsequent petition, finds grounds for relief asserted therein which could not reasonably have been raised in the original or amended petition.

———o———

STATEMENT OF THE CASE

Respondent, Joseph James Blake, was tried in the Superior Court of Chatham County, Georgia for the offense of murder. Following a jury trial, Respondent was sentenced to death upon a finding by the jury of the existence of the seventh statutory aggravating circumstance, i.e., that the offense of murder was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim." On direct appeal to the Supreme Court of Georgia, Respondent's conviction and sentence were upheld. Respondent filed a petition for a writ of certiorari to this Court which was denied on November 14, 1977. Respondent then filed a petition for a writ of habeas corpus in the

Superior Court of Tattnall County, Georgia on May 7, 1978. A state habeas corpus evidentiary hearing was conducted on May 24, 1978. State habeas corpus relief was denied on August 17, 1978. An application for a certificate of probable cause to appeal was denied by the Supreme Court of Georgia on January 11, 1979.

A motion for extraordinary relief was filed on Respondent's behalf in the Superior Court of Chatham County, Georgia on May 13, 1979, but this motion was denied and the denial was affirmed by the Supreme Court of Georgia on October 16, 1979. This Court denied Respondent's petition for a writ of certiorari on June 2, 1980.

A second state habeas corpus petition which was filed on Respondent's behalf in the Superior Court of Butts County, Georgia, was dismissed as successive under state law as contained in O.C.G.A. § 9-14-51, on September 2, 1980. The Supreme Court of Georgia denied Respondent's application for a certificate of probable cause to appeal on September 4, 1980.

Respondent filed an application for federal habeas corpus relief pursuant to 28 U.S.C. § 2254 on September 5, 1980 in the United States District Court of the Southern District of Georgia, Savannah Division. An evidentiary hearing was conducted in the district court on December 12, 1980 and federal habeas corpus relief was granted to the Respondent on April 29, 1981. Petitioner appealed the granting of federal habeas corpus relief, in which judgment the district court reviewed only three of the numerous grounds for relief raised by the Respondent. Oral argument was conducted in the case in the United States Court of Appeals for the Eleventh Circuit on February 4, 1982. On August 23, 1983, counsel for both parties were

informed that a final decision in this case would be withheld pending the decision of this Court in *Washington v. Strickland,* 693 F.2d 1243 (5th Cir. 1982), *cert. granted,* 103 S.Ct. 2451 (1983).

On July 13, 1984, the Eleventh Circuit Court of Appeals found that because the district court's order granting federal habeas corpus relief did not dispose of all of the claims raised by the Respondent, the subject order was not an "appealable final judgment" and the appeal was dismissed for want of jurisdiction. In its opinion of July 13, 1984, the Eleventh Circuit Court of Appeals expressed the opinion that the appropriate course to be pursued by the state was not to appeal the district court's order granting the writ as an interlocutory injunctive order, but rather to move the district court to stay the granting of the writ pending determination of the remaining claims. The Petitioner filed a motion for a stay of judgment and memorandum in support thereof on August 3, 1984. The motion of Petitioner to stay the court's order of April 29, 1981, pending disposition of Respondent's remaining claims was granted by the district court on August 8, 1984.

On March 29, 1985, the Eleventh Circuit "on sua sponte reconsideration" affirmed the order of the district court granting federal habeas corpus relief, finding that the district court's opinion granting federal habeas corpus relief to the Respondent was a final appealable order, although it did not address each of Respondent's claims. *Blake v. Kemp,* 758 F.2d 523 (11th Cir. 1985). The Eleventh Circuit also found that the State had an obligation to provide to a court appointed psychiatrist sufficient information of allegedly "psychiatrically significant" evidence

to allow the determination of whether or not Respondent was sane at the time of the offense. The Eleventh Circuit found that this obligation on the state was a continuing obligation. The Eleventh Circuit also found that trial counsel was ineffective during the sentencing phase of Respondent's trial, for failing to investigate and present "character" witnesses and finding that prejudice need not be determined because of the failure to present mitigating evidence at the sentencing phase. (A lengthy dissent was also filed to this opinion).

On May 13, 1985, the Eleventh Circuit entered an order denying Petitioner's petition for rehearing and suggestion for rehearing *en banc.*

Petitioner seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit in *Blake v. Kemp,* 758 F.2d 523 (11th Cir. 1985).

———o———

REASONS FOR GRANTING THE WRIT

I. The Eleventh Circuit Has Fashioned A New Constitutional Rule Placing A Continuing Obligation On The State To Provide Any Court Appointed Psychiatrist Who Determines A Defendant's Sanity At The Time Of The Offense, With Any Information That Might Allegedly Be "Psychiatrically Significant" On The Issue Of Sanity, Throughout The Entire Criminal Prosecution.

In the dissenting opinion of Circuit Judge Tjoflat to the Eleventh Circuit opinion in *Blake v. Kemp,* 758 F.2d 523 (11th Cir. 1985), Judge Tjoflat properly concluded that the majority opinion has "fashioned a new constitutional rule" that:

> Whenever the court appoints a psychiatrist to determine the defendant's sanity at the time of the offense, the State becomes obligated to provide the psychiatrist, on its own initiative, with any information that might prove to be psychiatrically significant on the sanity issue, and this obligation continues throughout the criminal prosecution. To ensure the State's compliance with this rule, the majority holds that, if the State fails to provide the psychiatrist psychiatrically significant information as to the defendant's sanity at the time of the offense, defense counsel will be deemed ineffective as a matter of law and the defendant's conviction must be set aside.

Id. at 548.

Circuit Judge Tjoflat went on to note:

> The district court, and the majority, have fashioned this rule and remedy out of their concern that the defendant receive a fair trial. In this case, they have concluded that petitioner's trial was rendered unfair because Dr. Bosch did not have the withheld information sufficiently in advance of testifying to enable him to give it the sort of deliberate consideration the majority thinks was necessary. They have drawn this conclusion purely from *their own lay assessment* of what was, and is, vital to the rendition of an expert psychiatric opinion of the specie Dr. Bosch was asked to give. I say this because there is nothing whatever in the record indicating that Bosch would have testified any differently than he did had the State made the information in question available to him at an earlier time.

Blake v. Kemp, supra, at 549.

In this case, Respondent had been admitted to Central State Hospital pursuant to the trial court's order for an examination and evaluation of his medical condition and

his mental capacity to face the charges of murder and kidnapping on December 3, 1975. (T. 89). The examination revealed that Respondent was in good physical health. Respondent's mental condition was determined to be "reactive-depressive." It was determined during the period of Respondent's psychiatric examination that he was not "insane". (T. 94). It was further determined that Respondent had no past history of psychiatric problems. (T. 196). Dr. Miguel Bosch, the director of the forensic psychiatric center at Central State Hospital in Milledgeville, Georgia, testified concerning Respondent's admission to Central State Hospital pursuant to the order of the trial court and the result of Respondent's examination and evaluation. (T. 87-129). Dr. Bosch testified that Respondent was admitted to Central State Hospital "under superior court order from this County for an examination and evaluation of his medical condition and mental capacity to face the charges of murder and kidnapping." (T. 89). Dr. Bosch testified that physical and psychiatric examinations were performed on the Respondent. (T. 90). Respondent was diagnosed as having a "reactive-depressive condition". (T. 91). Dr. Bosch stated:

> He was depressed; he was tense; he have (sic) problem in his sleeping; he seemed to have some problem in concentrating and, also, a problem with his memory. He seemed to have dreams at night of what was unpleasant to him; unpleasant dreams; and, he seemed to be having some feeling of guilt about what he was going through. And, also, he had a hopeless feeling about himself.

(T. 91). Dr. Bosch's report stated that the patient's diagnosis could be considered as a "mitigating circumstance of the alleged offense", because Respondent was suffering from what had occurred. (T. 94). Dr. Bosch

testified that there was no evidence that Respondent had a past history of psychiatric problems. (T. 96).

On cross-examination by Respondent's trial counsel, Mr. Haupt, Dr. Bosch testified that he had not been supplied any statement or transcript of statements made by the defendant shortly after the crime, but rather, the only information that he was given was a police report or investigative report. (T. 98). Mr. Haupt cross-examined Dr. Bosch as to whether or not it was possible to determine whether or not a person was insane or laboring under a mental disability at the time of the occurrence of the crime. (T. 98). Dr. Bosch stated that "sometimes it is possible to do that." (T. 98). Dr. Bosch testified that at the time Respondent was with him, he did not see any indication that Respondent was psychotic. Dr. Bosch was also cross-examined as to whether or not a person could be psychotic one moment and not the next and Dr. Bosch replied in the affirmative. (T. 99-100). Mr. Haupt asked Dr. Bosch a hypothetical question that if the Respondent dropped the child from the bridge and thought he was doing something right, but knew full well that he was dropping a child off a bridge whether or not that would be temporary insanity and Dr. Bosch replied, "I say so." (T. 101).

As noted in the dissenting opinion of Circuit Judge Tjoflat, on cross-examination, Dr. Bosch was confronted with Petitioner's statement given to police and obtained an admission from Dr. Bosch that from the confession, that Petitioner was "doing something right". (T. 101-103). However, Dr. Bosch stated, "There is, as far as I'm concerned, there is to me after reading this, I just can't tell you that (sic) was insane or was sane. Nobody can tell you from reading this dissertation that this particular man got to be sane or got to be insane." (T. 104).

Dr. Bosch reiterated that the court order had asked four different questions, the question of "criminal ability", the question of "mental competency", the question of "recommendations", and the question of "mitigating circumstances". (T. 109). Dr. Bosch reaffirmed his statement made in the report filed in response to the court order, that no opinion could be reached as to Respondent's mental condition at the time of the alleged offense. (T. 109).

Petitioner submits that under this scenario, prejudice should not be presumed because of the extent to which a criminal defendant has control over the issue of his sanity at the time of the offense. Specifically, in this case, the Respondent chose not to tell the psychiatrist anything about the crime. *Blake v. Kemp, supra* at 551. Circuit Judge Tjoflat also noted that prejudice should not be presumed under circumstances such as those involved in this case, because of the "burden such a presumption would place on the State would be intolerable. The State has to marshal at its peril the 'psychiatrically significant information' on the insanity issue. It must divine what is and is not pertinent, and it must do so until the trial is over. To satisfy the State's burden, the prosecutor must have continuous access to the psychiatrist, and he must compare the psychiatrists' information with his to ensure that the psychiatrist has all the facts." *Blake v. Kemp, supra,* at 551.

Circuit Judge Tjoflat also correctly noted in his dissenting opinion that the prejudice presumed to the Respondent under the facts of this case is in violation of the precedent of this Court as contained in such cases as *United States v. Cronic,* — U.S. —, 104 S.Ct. 2039 (1984) and *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052 (1984).

As the Eleventh Circiut Court of Appeals has fashioned a new constitutional rule and has undermined the "prejudice" requirement for showing ineffective assistance as established in recent decisions of this Court, Petitioner submits that this presents an exceptional question concerning which a writ of certiorari should issue.

II. The Georgia Court's Finding Of State Procedural Default Should Have Been Given Deference By The District Court And/Or The Eleventh Circuit Court Of Appeals, So As To Require That Respondent Establish "Cause" And "Prejudice" Before Procedurally Defaulted Claims Under State Law Are Considered On Their Merits.

In his dissenting opinion in *Blake v. Kemp, supra,* Circuit Judge Tjoflat correctly notes that the district court raised *sua sponte,* and without notice to either party, two exhausted, but procedurally defaulted claims. *Blake v. Kemp, supra,* at 544. Petitioner respectfully submits that Judge Tjoflat correctly noted that before a federal district court can entertain the merits of a procedurally defaulted claim, the court must first determine that a habeas corpus petitioner has a justifiable reason for not having raised the claim in state court. Here, two of the three issues upon which the district court granted federal habeas corpus relief to the Respondent had been raised only in a successive state habeas corpus petition. This successive state habeas corpus petition was dismissed without a hearing on the merits under state law allowing the dismissal of successive habeas corpus petitions. *See* O.C.G.A. § 9-14-51. Specifically, the claims which were found to be procedurally defaulted under state law were Respondent's contentions that he was denied due process of law because the State-provided psychiatric examination and resulting

opinion as to Respondent's sanity at the time of the offense was inadequate and that Respondent was denied effective assistance of counsel because the State's conduct allegedly prevented trial counsel from developing an insanity defense.

As Circuit Judge Tjoflat's dissenting opinion also notes, the question of exhaustion was not pertinent, but rather, the question was whether the procedural default under state law should be honored by the federal court and whether Respondent established cause and prejudice under this Court's decision in *Wainwright v. Sykes,* 433 U.S. 72 (1977). Of course, recent decisions of this Court in such cases as *Engle v. Isaac,* — U.S. —, 102 S.Ct. 1558 (1982), have more clearly defined the deference due from the federal courts to state procedural defaults and the necessity that a habeas corpus petitioner demonstrate cause and prejudice before having a procedurally defaulted claim reviewed on its merits. In short, Petitioner submits that Circuit Judge Tjoflat was correct in stating that the procedural default rule in Georgia with respect to successive habeas corpus petitions, is due deference and the failure to accord appropriate deference in this case is a question of such importance as to warrant the granting of a writ of certiorari. *See Blake v. Kemp, supra,* at 547.

III. The Eleventh Circuit's Application Of Strickland v. Washington, — U.S. —, 104 S.Ct. 2052 (1984), Is A Question Of Exceptional Importance, Due To The Fact That The Eleventh Circuit's Application Of The Standard, Has Effectively Eliminated The "Prejudice Prong" Of The Two Part Test For Judging Ineffective Assistance Of Counsel Claims.

In granting federal habeas corpus relief, the district court found that Respondent's trial counsel, Reginald

Haupt, had been ineffective during the sentencing phase of Respondent's trial because he allegedly should have "presented something good" about the Respondent during the sentencing phase. *See Blake v. Zant,* 513 F.Supp. 772 (S.D.Ga. 1981). The decision of the district court was, of course, decided prior to the decision of this Court in *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052 (1984).

The Eleventh Circuit's decision in this case essentially "presumed prejudice" from the failure of Respondent's trial counsel to present any character evidence at the sentencing phase, rather than applying that portion of this Court's opinion in *Strickland v. Washington, supra,* requiring that a defendant demonstrate there is a "reasonable probability" that but for counsel's unprofessional errors, the results of the proceedings would have been different. *Id.* at 2068.

Petitioner submits that in his dissenting opinion, Circuit Judge Tjoflat correctly analyzed the prejudice prong of this Court's decision in *Strickland v. Washington, supra,* as requiring that, "a court cannot find such a 'reasonable probability' without weighing the mitigating evidence against the aggravating evidence that supports the imposition of the death penalty." *Blake v. Kemp, supra,* at 552. Instead, the Eleventh Circuit found prejudice by holding, "We must believe that the probability that Blake would have received a lesser sentence but for his counsel's errors is sufficient to undermine our confidence in the outcome." *Blake v. Kemp, supra,* at 535.

Petitioner respectfully submits that if this interpretation of the "prejudice prong" of this Court's decision in *Strickland v. Washington, supra,* is allowed to stand, the burden of demonstrating prejudice by a habeas corpus

petitioner due to alleged ineffective assistance of counsel, is effectively eliminated and prejudice must be presumed where any deficient performance has been found. For these reasons, Petitioner requests that a writ of certiorari be issued to review this important question.

CONCLUSION

For all of the above and foregoing reasons, Petitioner prays that this Court grant a writ of certiorari in order to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985).

Respectfully submitted,

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APPENDIX "A"

Joseph James BLAKE,
Petitioner-Appellee,

v.

Ralph KEMP, Warden, Georgia Diagnostic Center, Respondent-Appellant.

No. 81-7417.

United States Court of Appeals,
Eleventh Circuit.

March 29, 1985.

State appealed from order of the United States District Court for the Southern District of Georgia, B. Avant Edenfield, J., 513 F.2d 772, granting writ of habeas corpus. The Court of Appeals, Tuttle, Senior Circuit Judge, held that: (1) district court's order granting writ of habeas corpus was final appealable judgment, even if judgment rested on decision on fewer than all grounds asserted by defendant; (2) by failing to provide examining psychiatrist with defendant's taped confession and letter written by defendant, state deprived defendant of federal constitutional right to meaningful psychiatric examination and opinion and thus deprived him of right to effective assistance of counsel; and (3) defendant, who had been sentenced to death, was prejudiced by failure of his attorney to make any preparations for penalty phase of his murder trial, where there were character witnesses who could have testified in mitigation.

Affirmed.

Tjoflat, Circuit Judge, filed dissenting opinion.

Opinion, 737 F.2d 925, vacated.

Susan V. Boleyn, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellant.

Joe Nursey, Andrea Young, Millard C. Farmer, Pamela L.J. Arangno, Atlanta, Ga., for petitioner-appellee.

Appeal from the United States District Court for the Southern District of Georgia.

On *Sua Sponte* Reconsideration

Before TJOFLAT* and CLARK, Circuit Judges, and TUTTLE, Senior Circuit Judge.

TUTTLE, Senior Circuit Judge:

1. APPEALABILITY OF DISTRICT COURT'S ORDER

Following the publication of our opinion in this case at 737 F.2d 925 (11th Cir. 1984), the Court withheld the mandate *sua sponte* to give further consideration to the appealability of the district court's grant of the writ of habeas corpus. In that opinion, we announced what amounted to a new procedural rule touching upon the finality of judgments of habeas courts which enter judgments on some, but less than all, the "claims" before them. That rule is that each ground or basis which a habeas petitioner assigns as a ground or reason for the grant of the writ is a separate "claim" within the meaning of

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* TJOFLAT, Circuit Judge, dissented and filed separate opinion.

Fed.R.Civ.P. 54(b)[1] and that if the habeas court either grants the petition or denies by deciding some, but not all, of the issues presented, the judgment of the court is not a final judgment and therefore this Court lacks jurisdiction to entertain the appeal under U.S. Code, Section 1291.[2]

Since, as we recognized in our prior opinion, "The Federal Rules of Civil Procedure do not always apply to habeas proceedings," we undertook to consider their applicability to the appeal in this case. The issue was not raised by either party and was, of course, not briefed.

Upon further consideration, we have concluded that our prior opinion should be vacated.

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1. This Rule provides as follows:

> (b) *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, crossclaim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the right and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Fed.R.Civ.P. Rule 54(b).

2. This section provides as follows:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .

28 U.S.C. § 1291.

We perceive a substantial difference between the finality of a judgment by a district court *granting* the writ of habeas corpus on two of several grounds and of a judgment denying the writ on the basis of the court's determining the sufficiency of less than all of the asserted grounds. The only question we have before us on appealability is of the former kind of order.

We now conclude that a judgment ordering the release of a convicted defendant unless the state should retry him within a specified time "ends the litigation and leaves nothing for the court to do but execute the judgment." *Catlin v. United States,* 324 U.S. 229, 233, 65 S.Ct 631, 633, 89 L.Ed. 911 (1945).

Since both parties here were faced with a judgment that gave the petitioner all he could hope to achieve by the litigation and the state was required to hold a new trial or release the petitioner, it would defy logic for us to hold that such a judgment was not final within the meaning of 28 U.S.C. § 1291.

We arrive at this conclusion without reaching the question whether each separate ground alleged as a basis for granting the writ is a "claim" under Rule 54(b) and without reaching the question whether, assuming it is, Rule 54(b) should be adhered to in a case in which the district judge *denies* the writ on one or more, but less than all, the claims. Those two questions remain for a later day when they are presented to the Court in an actual case and they are fully briefed by the parties.

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II. STATEMENT OF THE CASE

This is an appeal by the State of Georgia from the grant of the writ of habeas corpus to Joseph James Blake, following his conviction of murder in the first degree and sentence to death in the Superior Court of Chatham County, Georgia. The procedural history of this case, demonstrating that all state remedies have been exhausted may be found in the report of the district court's opinion at *Blake v. Zant,* 513 F.Supp. 772 (S.D.Ga.1981).

As stated by the habeas court, "the circumstances leading up to the death of Tiffany Loury [aged two] are generally not in dispute." The habeas court stated the facts as follows:

> In November 1975, Jacquelyn Loury and the decedent child were living with her mother, Mrs. Florence Smith, and several of Mrs. Smith's other children. Jacquelyn and Mr. Blake had dated for about nine months and planned to be married. The petitioner asked Jacquelyn to go out with him the evening of November 14, 1975, but she told him that she planned to go out with a girlfriend, Denise Walker, instead. Nonetheless, Mr. Blake persisted and finally, after meeting her at the Walker home, Jacquelyn agreed to let the petitioner take her out drinking.
>
> Jacquelyn's mother kept Tiffany while Jacquelyn, Ms. Walker, the petitioner and several other persons went first to one bar and then another. During the course of the evening, a dispute developed between Mr. Blake and Jacquelyn, perhaps because of her interest in another man. Petitioner struck Ms. Loury on the side of the head with his fist. He was ejected from the lounge at that time and again around midnight when he tried to return.

Mrs. Smith testified that Tiffany and the other children had gone to bed shortly after 9:30 p.m. Mrs. Smith left the house to visit friends around 10:15 p.m. and returned about two hours later. She then noticed that the window next to the front door had been opened, and the curtains pulled back. However, Mrs. Smith did not believe anything was seriously amiss at that time. At approximately 1:00 a.m., Mr. Blake called Mrs. Smith. He asked whether Jacquelyn was home. When told that she was not, Mr. Blake informed Mrs. Smith that he had taken Tiffany. Mrs. Smith began scolding him for having the child out so late on a cold evening. Mr. Blake then hung up without saying anything more. However, it did not appear that Mr. Blake's having the child was in itself a source of major concern. He had taken the child out alone several times in the past, and his relations with her as well as the rest of the family had been good.

Petitioner testified that, after he had been thrown out of the bar the second time, he had gone back to Jacquelyn's home. When no one answered, he opened the window, unlocked the door, and entered. He found everyone except Tiffany asleep. Mr. Blake testified that he asked Tiffany if she wanted to go with him. She agreed and they left by the back door. Mr. Blake indicated that his intention was to take the child away because her mother did not deserve the child and had mistreated her in a variety of respects.

Mr. Blake testified further that he first intended to run away with Tiffany and, accordingly, crossed the Talmadge Memorial Bridge as the quickest exit route. Mr. Blake stated that he drove as far as Buford, South Carolina. However, he realized at some point that he could not simply run away with the child without being chased by the authorities. Initially, he reacted to this fact by deciding to kill himself and Tiffany there in Buford. Petitioner later decided to return to Savannah. He testified that he stopped on the bridge. There he and Tiffany prayed about going to

"another world" and being together forever "on the other side." Petitioner then dropped the child off the bridge to her death, which occurred on impact or very shortly thereafter.

Mr. Blake explained that he postponed his own trip to "the other side" so that he could tell the child's mother what had happened and why. Thus, petitioner did not in fact make any effort to conceal his actions. Quite the opposite, he contacted the police almost immediately after the incident, and began giving them substantially the same account of Tiffany's death that he testified to at trial, emphasizing that "I know I did wrong, but in another way I did right," while never once indicating that the child had been harmed or killed.[3]

The state's brief in this Court quotes from Blake's testimony at trial and says that the exact words used by Blake and Tiffany just before he stopped the car on the bridge were: "Would you like to go and stay with me forever?" She replied: "Yes." The appellee replied: "Okay. That's what we'll do. Nobody won't bother us again." The brief then says: "Then he stopped the car. The appellee and the child then got out of the car and knelt down and prayed at the bridge about going into another world on the other side. Then he told the child: "I'll send you first and I'll be along shortly after."

Although quoting this language from Blake's testimony, the state's brief appears to accept it as a true statement of what actually occurred.

Within six or seven hours after the baby's death, Blake gave a full taped confession to the investigating officer after adequate warnings had been given. At this

3. Blake later testified that he meant Bluffton, rather than Buford, South Carolina.

time, Blake stated that he did not want or need a lawyer because "he wouldn't be around." This statement, after describing his actions as outlined above, said:

> All I know is I did wrong and in another way I did right. At least the baby don't have to suffer about it because the mama and/or the real father ain't fit to have a child like that. The baby is too good for any one of us. She is in a better place now.

Subsequently, within two or three days, while in jail, Blake wrote the following note, which was delivered to the jailer:

> To Whom That Every Read This Letter, I have done the right thing by turning myself in, but I have a promise to keep to my little girl Tiffany. I told her that I would join her soon. But now the time has come for me to go to her. She came to me and said she wanted me now. So I must go because I promised Tiffany and I love her. That we'll be together on the other side. So you see and understand that I never lost her cause she is wait for me. I'm just sorry that Jackie won't be there with us. Me and Tiffany will live in peace now forever. I will go to her now. May god forgive me for all my sins. Joseph James Blake.

Some two weeks later, the trial court ordered a psychiatric examination for him. Following the then current policy for indigent defendants in Chatham County,[4] Blake was taken to Central State Hospital in Milledgeville, Georgia, for examination in the state-operated facility for the criminally insane. The stated purpose of this examination was to determine: (1) the defandant's psychiatric condition at the time of the crime; (2) whether the defend-

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4. This policy has now changed. A trial court may now permit appointment of a private psychiatrist at public expense for an indigent defendant.

ant was competent to stand trial; (3) recommendation for treatment; (4) any mitigating circumstances which might be present.

A police report describing the incident was given to Dr. Bosch. However, neither the taped confession nor the handwritten letter was given to the psychiatrist to aid him in his examination, although they were in the hands of the state when he was appointed by the court. Additionally, neither of them was given to defense counsel, nor was he made aware of their existence until the day before the trial on February 13, 1976.

Dr. Miguel Bosch, the examining psychiatrist,[5] was called by the State. This highlights the fact that both the state and the defense realized that sanity was the only issue in the case. He found Blake competent to stand trial although suffering from a "reactive-depressive" condi-

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5. Dr. Bosch gave the following description of his credentials:

> I finished Medical School at the University of Havana, Cuba in 1954. I practiced medicine in my country until 1960. I came to the United States in 1961. I went to the School of Medicine, University of Miami. Took an examination that was given by the Medical Association and I have a diploma from there. Also, I took an examination from the Medical Board of the Examiner of Georgia and I'm a licensed physician to practice medicine and surgery in the State of Georgia. . . . Also, I went to work at Central State Hospital in 1963 as a regular M.D. in that association until 1965. In 1965 I went into the psychiatric training which I finished in July, 1968. At that time I was given a diploma as a Psychiatrist. After that I was appointed Assistant Chief of the Psychiatric Services, Central State Hospital. And, after that when I complete my two year of clinical psychiatrist I was considered more eligible to the American Psychiatric Association. And, my present position at Central State Hospital is the Director of the Forensic Center, which is the maximum security hospital, Central State Hospital.

tion, which the doctor attributed to his difficult position. Later, at the trial, Dr. Bosch described the condition:

> He was depressed; he was tense; he have problem in his sleeping; he seemed to have some problem in concentrating; and, also, problem with his memory . . . . He seemed to be having some feeling of guilt about what he was going through . . . . He had a hopeless feeling about himself.

In response to a question posed by the state at the trial whether he found anything in his examination to indicate that Blake hated Jacquelyn, the mother of the dead child, Dr. Bosch answered: "No, I believe he was in love with her."

The most significant thing about the report, however, was the fact that Dr. Bosch stated:

> That as far as his condition of the alleged offense, I do not have an opinion. I didn't say that he was sane or insane. I said I don't have an opinion because I couldn't get any information from him. He claimed he had no memory of doing anything wrong. He said he lacked memory about the particular incident. And then for that reason I could not formulate an opinion about his condition at the time of the offense.

Thus, with both parties and the court aware that the only issue in the trial was insanity at the time of the act, the court proceeded to trial with no psychiatric evidence on that point.

At the federal court habeas hearing, Blake's counsel, Reginald C. Haupt, Jr., testified that in private conversation he personally sought appointment by the trial court of a private psychiatrist to examine his client, but was told that only a state employed psychiatrist would be provided and, further, that formal motion for private examination

would be both unwelcome and unavailing. He also testified that the financial circumstances of Blake's family were too limited for him to ask for their assistance and that his personal experience with local physicians had convinced him that no useful testimony or examination could be obtained without payment.

Thus, the trial started with the only professional statement relative to the sanity of the defendant at the time of the commission of the act being a statement by the state psychiarist that he was unable to determine that fact.[6] It later developed at the trial that the only evidence Dr. Bosch had before him at the time he made this statement was a copy of the arresting officer's report and an interview with the defendant who he said was unable to remember anything that happened at the time.

The two statements by Blake were totally inconsistent with the premise that he had no recollection of the events of the night of November 14-15. Instead, however, of the psychiatrist having an opportunity to see these documents, and make such use of them as he might to comply with the court's direction that he determine Blake's sanity, the only use that could be made of them in Blake's behalf was for his counsel to question the psychiatrist in cross-examination at the trial.

III. ISSUES PRESENTED

The state challenges the district court's holding that, in a capital case, a defendant whose sanity at the time of

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6. In response to the question: When he [Blake] was talking with you was he—did he appear to be under the influence of alcohol?, the arresting officer said: "No, not really. He seemed reasonably sane."

the alleged crime is fairly in question, has "*at a minimum* the constitutional right to at least one psychiatric examination and opinion developed in a manner reasonably calculated to allow adequate review of relevant, available information, and at such a time as will permit counsel reasonable opportunity to utilize the analysis in preparation and conduct of the defense."

The second issue is the correctness of the district court's finding as to the "reasonably effective assistance" of counsel that it was "confronted with conduct that falls far short of the requirement that reasonably adequate assistance in fact be rendered at the sentencing hearing."

A. Availability of Psychiatric Evidence

In discussing this issue, it is important to note what is not involved. In the first place, the trial court was not faced with the right of a defendant to ask for successive appointments at state expense of psychiatrists in order to obtain the kind of report that would be favorable to him. *Cf. United States ex rel. Smith v. Baldi,* 344 U.S. 561, 73 S.Ct. 391, 97 L.Ed. 549 (1953); *McGarty v. O'Brien,* 188 F.2d 151 (1st Cir. 1951). As stated by the district court:

> However in the present case, this court does not find only objection to a particular psychiatrist or to use of publicly employed psychiatrists *per se.* Similarly, petitioner does not advance any demand for multiple opinions in the face of already abundant evidence. *Here, it appears that no expert opinion at all was received on the central issue of petitioner's mental state at the time of the alleged crime.* It further appears that almost no lay opinion on this critical issue was received . . . . (emphasis added.)

The second thing not involved in the issues here is the burden of proof. Neither party here discusses the question as to who has the burden of proving the defendant's mental condition at the time of the commission of the act. The state, therefore, seems to concede that the defendant in such a case where the issue of sanity is fairly raised is entitled to have an adequate psychiatric evaluation of his state of mind, contending only that the defendant here got what he was entitled to by the time the trial was completed.

Third, since we conclude upon a careful reading of the record, that even after the cross-examination of the psychiatric witness at the trial, he was still unable to give an opinion as to the sanity of the defendant, we are not faced with the issue of the correctness of a decision that the defendant was sane.

Finally, the state makes no contention that there was either a failure to exhaust state remedies or that petitioner was barred from relief because of a procedural default.[7]

Then, what is before us for decision is whether the defendant was denied a federal constitutional right "to at least one psychiatric examination and opinion developed in a manner reasonably calculated to allow adequate review of relevant, available information, and at such a time as [would] permit counsel reasonable opportunity to utilize the analysis in preparation and conduct of the defense."

In approaching this question, we must remember that the confession contained the statement by Blake "in another way I did right," in light of the psychiatrist's answer to the following questions at trial:

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7. This issue discussed in the dissenting opinion is therefore not before us.

Q. If when the defendant dropped the child from the bridge and he thought he was doing something right but knew full well that he was dropping child off a bridge, would that be temporary insanity?

A. I say so.

Q. You think so?

A. Yes.

Q. In his own mind, you said that he felt that he was doing right?

A. I believe so.

We must also remember that in the letter not furnished to Dr. Bosch, written by Blake several days after the incident, he made the statement that "Tiffany came to me and said she wanted me now so I must go because I promised Tiffany and I love her. That we'll be together on the other side. So you see and understand that I never lost her cause she is waiting for me" and further, "I will go to her now." It hardly seems likely that a psychiatrist would not also have stated that if Blake in fact believed that Tiffany had "come to him" after her death this would be equally strong evidence of at least "temporary insanity." We also must bear in mind the fact that Blake did actually attempt suicide, and was thereafter kept under constant surveillance while in jail to prevent a further attempt by him on his own life.

We, of course, do not know whether the psychiatrist, if he had these statements before him and an opportunity further to question the accused, would have found them accurately to state Blake's belief and, if so, whether he would have determined that Blake was insane at the time of the act. We hold, however, that the statements at least raise sufficient question as to Blake's sanity that they should

have been presented to the psychiatrist early enough to allow adequate consideration of them in preparation of his evaluation. As stated by the district court:

> Moreover, it is obvious that the state made little or no effort to supply Dr. Bosch and apparently Mr. Haupt as well with such information as the defendant had already voluntarily provided. The state's failure to produce the transcript of November 15, 1975 was hardly cured by events at trial. Careful analysis of the defendant's statement would surely require more than a single reading. Yet this one reading was apparently the only expert analysis of the petitioner's obviously quite bizarre account of the incident that has ever occurred. The court finds such analysis wholly inadequate, especially where there is little or no indication that serious efforts were made to obtain petitioner's own firsthand statement after the initial interview had failed. Given petitioner's willingness to discuss the incident on many other occasions, there is no obvious basis for believing that such efforts would have been futile.
>
> The court finds that, in this case, reasonable efforts were not made to examine the petitioner with respect to his sanity at the time of the alleged crime. The court further concludes that, even were it impossible to interview the petitioner directly with respect to the incident, reasonable efforts were not made to provide Dr. Bosch with alternative means for consideration of the petitioner's condition. Consistent with this determination, the court must also conclude that Mr. Haupt was not provided with adequate expert assistance in the preparation of his case. Apparently, he was afforded no professional opinion on the question of Mr. Blake's sanity at the time of the incident until Dr. Bosch's comments were received on the witness stand at trial. At this point, with the presentation of evidence more than half complete and the theory of his defense already outlined for the jury, it was obviously too late for any significant benefit.

In sum, we conclude that on the facts of this case, Blake had the constitutional right posed by the above question and we agree with the district court that the right was denied him.

This conclusion is fully supported by the most recent Supreme Court decision dealing with the state's obligation in a criminal case "to assure that the defendant has a fair opportunity to present his defense." *Ake v. Oklahoma,* — U.S. —, 105 S.Ct. 1087, 83 L.Ed.2d — (1985). In *Ake* a defendant in a murder trial had demonstrated bizarre conduct on arraignment and the trial court had him sent to a state psychiatric hospital for a determination as to his ability to stand trial. He was placed on medication and sent back for trial after several months. Thereupon Ake noted his defense to be that of insanity at the time of the commission of the killings. At no time had any psychiatrist made any inquiry into Ake's sanity at the time of the acts he was charged with, although his counsel moved for appointment of a psychiatrist.

The court, after discussing the potential help that might be provided by a psychiatrist, stated:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the state must, *at a minimum,* assure the defendant access to a competent psychiatrist *who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.* This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel

> we leave to the states the decision on how to implement this right.

— U.S. at —, 105 S.Ct. at 1097 (emphasis added).

The habeas court associated the effect of the actions by the state court, the prosecution and the psychiatric witness with the issue of effectiveness of counsel. The court cited *United States v. Edwards,* 488 F.2d 1154 (5th Cir. 1974), stating that the courts have "long recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel." 488 F.2d at 1163. The same concept has been stated in a state case: "In *McCollum v. Bush,* 5 Cir. 1965, 344 F.2d 672, we affirmed a decision holding that a state's action in adjudicating an indigent defendant guilty without honoring his request for the assistance of psychiatric experts denied [him] both a fair trial and the effective assistance of counsel." *Pedrero v. Wainwright,* 590 F.2d 1383, 1396 (5th Cir.1979).[8]

So, too, does the Supreme Court seem to equate the need for psychiatric aid to assistance of counsel. — U.S. at —, 105 S.Ct. at 1093, citing *Gideon v. Wainwright,* 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); *Douglas v. California,* 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Evitts v. Lucey,* — U.S. —, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985); and *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

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8. Contrary to the statement in the dissent that we fashion a rule for every criminal case, we make a decision solely *on the facts of this case,* in which the sanity of the defendant was fairly raised and which demonstrated the withholding of evidence from the psychiatrist which at trial he testified was "psychiatrically significant."

We note that the Supreme Court has recently provided guidance in the resolution of a criminal defendant's claim of ineffectiveness of counsel. In *United States v. Cronic,* — U.S. --, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the Court held that unless the surrounding circumstances justify a presumption of effectiveness, the inquiry must focus on counsel's actual performance at trial in order to ascertain whether counsel failed to function adequately as the government's adversary. 104 S.Ct. at 2048.

In a companion case, *Strickland v. Washington, supra,* the Court announced a two-pronged test to be applied in ascertaining whether errors committed by a defendant's counsel amounted to ineffective assistance of counsel:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

104 S.Ct. at 2064.

In *Cronic,* the Court concluded that a determination of whether counsel's actual performance was constitutionally deficient requires an examination of specific errors in light of the test set forth in *Washington. Cronic,* 104 S.Ct. 2051 n. 41.

In this part of the habeas corpus petition, the appellee is not alleging acts on the part of his counsel which fell below constitutionally acceptable standards. Thus, *Washington,* which focuses on allegations of substandard representation, does not directly apply. Rather he is alleging actions on the part of the state which made it impossible for his counsel to render meaningful assistance on the issue of the appellee's sanity. Our inquiry must therefore begin by focusing on the effect of the challenged actions upon the adversary process: did they so completely deprive Blake of the right "to require the prosecution's case to survive the crucible of meaningful adversarial testing," *Cronic,* 104 S.Ct. at 2047, as to make the outcome of the trial presumptively unreliable.[9]

We believe that it did. Blake's sanity at the time of the alleged crime was fairly in question. Indeed, it was the only material issue presented to the jury on the question of guilt. At counsel's request the trial judge ordered a psychiatric evaluation of the defendant as to both his competency to stand trial and his sanity at the time of the offense. Dr. Bosch interviewed the defendant and stated that he could reach no conclusion on the question of sanity at the time of the offense, largely because in the interview Blake could not remember anything about the crime. Thus, although Dr. Bosch was under a court order to express an opinion as to Blake's sanity at the time of the offense, he had no factual information on which to base such an opin-

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9. The Supreme Court has found state interference with the assistance of counsel presumptively unconstitutional in a variety of circumstances. *See, e.g., Geders v. United States,* 425 U.S. 80, 91, 96 S.Ct. 1330, 1336, 47 L.Ed.2d 592 (1976) (order prohibiting defendant from consulting with counsel during overnight recess); *Herring v. New York,* 422 U.S. 853, 865, 95 S.Ct. 2550, 2556, 45 L.Ed.2d 593 (1975) (refusal to permit defense attorney to make closing arguments in criminal bench trial); *Powell v. Alabama,* 287 U.S. 45, 71, 53 S.Ct. 55, 65, 77 L.Ed. 158 (1932) (failure to appoint specific counsel for indigent capital defendants prior to commencement of trial).

ion, other than that provided in the police report, which he found insufficient. At the same time the police possessed two pieces of evidence—the tape of the confession and the suicide note—which Dr. Bosch later, at trial, indicated were highly relevant, or psychiatrically significant, on the question of Blake's sanity. Nevertheless, neither of these pieces of evidence was made available to defense counsel until the day before the trial, or to Dr. Bosch until he testified.[10] Meanwhile, the trial court had

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10. Further support for our holding in this case can be found in the case of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) and its progeny. In *Brady* the Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87, 83 S.Ct. at 1196. As the Court made clear in *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976) the absence of a request is not necessarily fatal to a *Brady* claim. In this case, the judge's order of a psychiatric examination placed a duty upon the prosecution to provide the doctor and the defense with the transcript of the confession and the suicide note. This information was certainly material in that it indicated Blake's state of mind at the time closest to the incident.

The prosecution did, however, release this information to the defendant the day before trial. In some instances that may be sufficient. *See Weatherford v. Bursey*, 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977) (names of witnesses can be disclosed on the day of trial). However, as other courts have recognized, some material must be disclosed earlier. *See Grant v. Alldredge*, 498 F.2d 376, 381 (2d Cir. 1974); *United States v. Donatelli*, 484 F.2d 505 (1st Cir. 1973). This is because of the importance of some information to adequate trial preparation. In this case, the information was critical to trial preparation. It not only affected the psychiatrist's report, but also the defense's abil-

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made it clear to Blake's attorney that any motions for further psychiatric evaluation in order to obtain an opinion about Blake's sanity at the time of the offense would not be entertained.

Thus, Blake and his attorney were left with virtually no evidence on which to base a defense of insanity until the day before trial, though highly significant evidence relevant to that issue had been in the hands of the police since shortly after Blake's arrest. Under these circumstances, we do not hesitate to find that the state so materially interfered with the defendant's ability "to require the prosecution's case to survive the crucible of meaningful adversarial testing" as to raise a presumption that the defendant's counsel could not have been able to provide effective assistance as required by the Sixth and Fourteenth Amendments. *See Cronic*, 104 S.Ct. at 2047. Moreover, we do not believe that the extreme prejudice caused by the state's actions was cured by the opportunity given to defense counsel to cross-examine Dr. Bosch on the basis of the confession and the letter. This was hardly an adequate substitute for a psychiatric opinion developed in such a manner and at such a time as to allow counsel a reasonable op-

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ity to present an adequate insanity defense. Dr. Bosch testified he could not give an opinion as to Blake's sanity at the time of the crime due to a lack of information. Obviously, he was reluctant to give an opinion when confronted with this information for the first time on the witness stand. Had the prosecution disclosed the material it had in its possession, Dr. Bosch would not have been in this situation and possibly could have rendered an opinion. We further note that the state's disclosure of the police report, while simultaneously withholding the confession and the suicide note, is indicative of bad faith on the part of the prosecution.

portunity to use the psychiatrist's analysis in the the preparation and conduct of the defense.

B. *Ineffectiveness of Counsel at the Sentencing Hearing*

The district court also vacated the sentence of death on the ground that trial counsel's service to Blake at the sentencing hearing fell "far short of the requirement that reasonably adequate assistance in fact be rendered." 513 F.Supp. at 779.

Blake's defense counsel, Haupt, testified at the habeas hearing that he made no preparations whatsoever for the penalty phase of Blake's trial because he believed that Blake would be found not guilty by reason of insanity. It was his philosophy that a lawyer should try "to win [a case] rather than prepare for losing it." Only after the jury had retired did Haupt sense that his client would be found guilty. At that time he sought a continuance, which was denied.

As a result, Haupt went into the sentencing phase without any idea whether there was or was not mitigating evidence available which might persuade the jury not to impose a death sentence, other than the psychiatric evidence introduced during the trial.

As noted earlier, the Supreme Court's opinion in *Strickland v. Washington* enunciated a two-part test which must be applied in judging whether defense counsel's errors amounted to ineffective assistance of counsel. 104 S.Ct. at 2064. We do not hesitate in agreeing with the district court that Blake has satisfied the first part of the test. It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably

effective assistance of counsel by any objective standard of reasonableness.

This is not the end of the inquiry, for Blake must also demonstrate that he was prejudiced by his attorney's conduct. The district court determined that Haupt's error was prejudicial *per se* and that even if prejudice needed to be affirmatively proved, Blake had adequately shown that Haupt's ineffectiveness was prejudicial: "[n]evertheless, petitioner has made a credible, if hardly overwhelming, showing of prejudice." 513 F.Supp. at 780.

However, because the district court was without the benefit of *Strickland,* we must reexamine this conclusion in light of that case's holding. There the Court held, first, that "[c]onflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively proved prejudice." 104 S.Ct. at 2067. The Court added that such claims "cannot be classified according to likelihood of causing prejudice." *Id.*

The Court also enunciated the proper standard for proving prejudice resulting from ineffective counsel:

> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Id. 104 S.Ct. at 2068.

We agree with the district court that a presumption of prejudice would be proper where counsel's representation was so deficient as to amount in every respect to no representation at all, *see Adams v. Balkcom,*

688 F.2d 734, 739 n. 1 (11th Cir. 1982). However, we do not believe this is the case here, although this is a very close question. As Haupt acknowledged at the habeas hearing, the psychiatric evidence presented during the guilt phase of the trial was relevant not only to the issue of insanity but also to the question of mitigation in the determination of an appropriate penalty. Furthermore, there is no contention that Haupt did not build a reasonably cogent argument around the psychiatric evidence as a basis for mitigation; although no record of that argument exists. Thus, on balance, it probably cannot be said that Blake's defense during the penalty phase was a mere sham, amounting to no representation at all.

We must then turn to the question whether Blake has demonstrated actual prejudice—that is, whether it is reasonably probable that the jury would have imposed a lesser sentence, but for Haupt's failure to prepare for the penalty phase of the trial. We note that, in finding actual prejudice, the district court applied a harmless error standard, which is incorrect under *Strickland v. Washington.*

Upon an exhaustive search of the record, we nevertheless believe that Blake has adequately demonstrated a reasonable probability that he would have received a lesser sentence but for Haupt's complete failure to search out mitigating character evidence. As the district court found, "[p]etitioner has demonstrated that no favorable evidence was sought and that some was in fact available." 513 F.Supp. at 781. Haupt apparently did interview Blake's father on more than one occasion and there were other persons with the father during those interviews. It also appears that he met with both of Blake's parents at his office one time before the trial. This apparently was the

extent of his investigation into character evidence which might be used for mitigation at a penalty proceeding.

At the habeas hearing, Blake proffered four persons, in addition to his mother, who could and would have testified to mitigating circumstances on his behalf but who were never contacted by Haupt. Three had known him since childhood. All could have testified to the effect that Blake was a man who was respectful toward others, who generally got along well with people and who gladly offered to help whenever anyone needed something. His mother also named four other persons who would have testified on Blake's behalf but who had since died.[11] We agree with the district court that:

> Mr. Haupt in no way used or even considered additional evidence which might have been available to support the defendant's cause. Such a performance hardly comports with the notion that the sentencing phase be in fact a distinct procedure where the jury's attention is focused not just on the circumstances of the crime, but also on special facts about this defendant that mitigate against imposing capital punishment!

513 F.Supp. at 780 (citations omitted).

The state insists that the absence of any mitigating evidence did not prejudice Blake because each of the witnesses would also have testified, if asked, that he or she

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11. Petitioner suggests that Haupt's failure to proffer his mother, Mrs. Bessie Blake, as a witness further prejudiced him because one of the jurors was a friend of Mrs. Blake who apparently did not recognize the petitioner as her friend's son. This argument is wholly frivolous. In determining prejudice, we are required to presume jury impartiality. *Strickland v. Washington,* 104 S.Ct. at 2068.

knew that Blake had once been arrested on an assault charge in connection with the stabbing of his estranged wife, Charlesetta Blake, who was pregnant at the time. We believe that while this very well could have persuaded a jury to impose the death sentence in any event, Blake was nevertheless prejudiced by the absence of the character evidence. In fact, during the guilt phase of the trial, the state was permitted to introduce testimony by Charlesetta Blake concerning the altercation which had preceded the stabbing, though any testimony about the stabbing was excluded. Mrs. Blake testified that, in an attempt to compel her to return to him, Blake had grabbed her two-year old son and held a knife to him, saying, "If I run this knife through this baby's heart, you'll come with me." Thus, the jury already knew much about the incident that was damaging to the defendant. The district court was correct when it noted that the available mitigating evidence "might have demonstrated to the jury that the petitioner was not the totally reprehensible person they apparently determined him to be. Certainly they would have provided some counterweight to the evidence of bad character which was in fact received." 513 F.Supp. at 780.

As we have already indicated, we find it a close question whether the petitioner received any defense at all in the penalty phase. Certainly he would have been unconstitutionally prejudiced if the court had not permitted him to put on mitigating evidence at the penalty phase, no matter how overwhelming the state's showing of aggravating circumstances. *See Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion); *Bell v. Ohio,* 438 U.S. 637, 642, 98 S.Ct. 2977, 2980, 57 L.Ed.2d 1010 (1978). Here, Haupt's failure to seek out and

prepare any witnesses to testify as to mitigating circumstances just as effectively deprived him of such an opportunity. This was not simply the result of a tactical decision not to utilize mitigation witnesses once counsel was aware of the overall character of their testimony. Instead, it was the result of a complete failure—albeit prompted by a good faith expectation of a favorable verdict—to prepare for perhaps the most critical stage of the proceedings. We thus believe that the probability that Blake would have received a lesser sentence but for his counsel's error is sufficient to undermine our confidence in the outcome. Therefore, the decision of the district court is

AFFIRMED.

TJOFLAT, Circuit Judge, dissenting:

The threshold question presented by this appeal is whether, in a habeas corpus case presenting multiple claims for relief, a court of appeals has the authority to review an order of the district court which grants relief without disposing of all of the petitioner's claims. Supreme Court precedent answers this question: we are powerless to review a district court order granting the writ of habeas corpus unless the order finally disposes of all of the claims the petitioner has presented. *Andrews v. United States,* 373 U.S. 334, 340, 83 S.Ct. 1236, 1240, 10 L.Ed.2d 383 (1963); *Collins v. Miller,* 252 U.S. 364, 365, 40 S.Ct. 347, 347, 64 L.Ed. 616 (1920). The Supreme Court views the exacting standards of finality that govern ap-

peals under 28 U.S.C. § 1291 (1982)[1] as applicable in habeas corpus cases as they are in other proceedings.

In his habeas petition to the district court in this case, the petitioner presented fifty-nine federal constitutional claims.[2] The district court, following a brief evidentiary

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1. 28 U.S.C. § 1291 (1982) provides, in pertinent part:

> **§ 1291. Final decisions of district courts**
>
> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court.

A final decision of the district court granting or denying a writ of habeas corpus is obviously a final decision described in section 1291.

28 U.S.C. § 2253 (1982) also gives the courts of appeals authority to review, on appeal, "the final order" of a district court in a habeas corpus action brought by a state prisoner. The petitioning state prisoner may not prosecute an appeal, however, "unless the justice or judge who rendered the order [sought to be reviewed] or a circuit justice or judge issues a certificate of probable cause." *Id.* This requirement operates to limit the court of appeals' appellate authority under both sections 1291 and 2253.

2. In his petition to the district court, petitioner did not present his claims in separate paragraphs. *See* Rule 2(c), Form of Petition, Rules Governing Section 2254 Cases (and accompanying Advisory Committee Note and form petition at paragraph 12), 28 U.S.C. fol. § 2254 (1982). *See also* Fed.R.Civ.P. 10(b); Rule 11, Federal Rules of Civil Procedure; Extent of Applicability, Rules Governing Section 2254 Cases, 28 U.S.C. fol. § 2254 (1982) (Federal Rules of Civil Procedure made applicable to habeas corpus proceedings to extent not inconsistent with the habeas rules and "when appropriate.") Rather, he combined many of his claims, especially those derived from common operative facts, in a single allegation. Petitioner's habeas petition, as I read it, stated the 59 claims that follow; the first 12 attacked petitioner's murder conviction, the remainder challenged his sentence.

(Continued on next page)

(Footnote 2—Continued)

1. The trial court's imposition of petitioner's judgment of conviction denied petitioner due process of law, in violation of the fourteenth amendment, because it was based on evidence from which no rational trier of fact could have found petitioner guilty beyond a reasonable doubt.

2. The trial court denied petitioner a fair trial, in violation of the Due Process Clause of the fourteenth amendment, by refusing to provide petitioner's court-appointed attorney funds to hire an investigator and expert witnesses to assist in the preparation and presentation of his defense.

3. The trial court denied petitioner the effective assistance of counsel, guaranteed him by the sixth and fourteenth amendments, by refusing to provide petitioner's court-appointed attorney funds to hire an investigator and expert witnesses to assist in the preparation and presentation of his defense.

4. The trial court denied petitioner a fair trial, in violation of the Due Process Clause of the fourteenth amendment, by refusing to provide petitioner's court-appointed attorney funds to hire a psychiatrist to examine petitioner for the purpose of determining whether petitioner was insane when he committed the homicide charged and, if so, testifying to that effect at trial.

5. The trial court denied petitioner the effective assistance of counsel, guaranteed him by the sixth and fourteenth amendments, by refusing to provide petitioner's court-appointed attorney funds to hire a psychiatrist to examine petitioner for the purpose of determining whether petitioner was insane when he committed the homicide charged and, if so, testifying to that effect at trial.

6. The prosecutor denied petitioner a fair trial, in violation of the Due Process Clause of the fourteenth amendment, by preemptorily challenging, during the voir dire examination of the jury venire, every prospective juror having conscientious or religious scruples against capital punishment.

7. The prosecutor denied petitioner his sixth and fourteenth amendment right to a jury representing a fair cross section of the community by systematically excluding, in the exercise of his preemptory challenges, every

(Footnote 2—Continued)

prospective juror having conscientious or religious scruples against capital punishment.

8. The trial court denied petitioner a fair trial, in violation of the Due Process Clause of the fourteenth amendment, by excusing for cause, during the voir dire examination of the jury venire, persons having conscientious or religious scruples against capital punishment.

9. The trial court denied petitioner his sixth and fourteenth amendment right to a jury representing a fair cross section of the community by excusing for cause prospective jurors having conscientious or religious scruples against capital punishment.

10. Petitioner was denied the effective assistance of counsel, guaranteed him by the sixth and fourteenth amendments, because his court-appointed attorney failed timely to present claims 1 through 9 above to the Georgia courts.

11. Petitioner was denied the effective assistance of counsel, guaranteed him by the sixth and fourteenth amendments, because his court-appointed attorney failed to order counsel's closing arguments to the jury transcribed for appellate review.

12. The Georgia death penalty sentencing scheme operates as a denial of due process in violation of the fourteenth amendment, and thus could not be applied in petitioner's case, because it lacks a rational justification as a penal sanction.

13. The Georgia death penalty sentencing scheme is cruel and unusual, in violation of the eighth and fourteenth amendments, and thus could not be applied in petitioner's case, because it lacks a rational justification as a penal sanction.

14. The Georgia death penalty sentencing scheme is unconstitutional, and thus could not be applied in petitioner's case, because it systematically results in the imposition of death sentences on account of the accused's and/or his victim's race, sex, and socioeconomic status, in violation of the Due Process Clause of the fourteenth amendment.

15. The Georgia death penalty sentencing scheme is unconstitutional, and thus could not be applied in petitioner's case, because it systematically results in the imposition of the death sentence on account of the accused's and/or his victim's race, sex, and socioeconomic status, in violation of the eighth and fourteenth amendments.

(Footnote 2—Continued)

16. The Georiga death penalty scheme is unconstitutional, and thus could not be applied in petitioner's case, because the state applies it in an arbitrary and capricious manner, in violation of the Due Process Clause of the fourteenth amendment.

17. The Georgia death penalty sentencing scheme is unconstitutional, and thus could not be applied in petitioner's case, because the state applies it in an arbitrary and capricious manner, in violation of the eighth and fourteenth amendments.

18. The Georgia death penalty sentencing scheme is unconstitutional, and thus could not be applied in petitioner's case, because its provisions for appellate review are fundamentally unfair, in violation of the Due Process Clause of the fourteenth amendment.

19. The Georgia death penalty sentencing scheme is unconstitutional, and thus could not be applied in petitioner's case, because its provisions for appellate review are fundamentally unfair, in violation of the eighth and fourteenth amendments.

20. The trial court's imposition of petitioner's death sentence denied petitioner due process of law in violation of the fourteenth amendment, because it was based on evidence from which no rational trier of fact could have found the aggravating circumstances described in Ga.Code § 27-2534.1(b) (7) (now codified at Ga.Code Ann. § 17-10-30(b) (7).

21. The trial court's imposition of petitioner's death sentence was cruel and unusual, in violation of the eighth and fourteenth amendments, because it was based on evidence from which no rational trier of fact could have found the aggravating circumstances described in Ga.Code § 27-2534.1(b) (7) (now codified at Ga.Code Ann. § 17-10-30(b) (7).

22. Ga.Code § 27-2534.1(b) (7) (now codified at Ga. Code Ann. § 17-10-30(b) (7) ("The offense of murder . . . was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggra-

(Footnote 2—Continued)

vated battery to the victim"), which provided the aggravating circumstance on which the jury based its recommendation that petitioner received the death penalty, is vague and overbroad, thus rendering petitioner's death sentence cruel and unusual, in violation of the eighth and fourteenth amendments.

23. Ga.Code § 27-2534.1(b) (7) (now codified at Ga. Code Ann. § 17-10-30(b) (7) ("The offense of murder . . . was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim"), which provided the aggravating circumstance on which the jury based its recommendation that petitioner receive the death penalty, is vague and overbroad, thus rendering petitioner's death sentence arbitrary and capricious, in violation of the Due Process Clause of the fourteenth amendment.

24. The trial court denied petitioner a fair sentencing proceeding, in violation of the Due Process Clause of the fourteenth amendment, in refusing to provide petitioner's court-appointed attorney funds to hire an investigator and expert witnesses to assist in the preparation and presentation of mitigating evidence.

25. The trial court denied petitioner the effective assistance of counsel, guaranteed him by the sixth and fourteenth amendments, by refusing to provide petitioner's court-appointed attorney funds to hire an investigator and expert witnesses to assist in the preparation and presentation of mitigating evidence.

26. The trial court denied petitioner a fair sentencing proceeding, in violation of the Due Process Clause of the fourteenth amendment, by refusing to provide petitioner's court-appointed attorney funds to hire a psychiatrist to examine petitioner for the purpose of preparing and presenting mitigating evidence.

27. The trial court denied petitioner the effective assistance of counsel, guaranteed him by the sixth and fourteenth amendments, by refusing to provide petitioner's court-appointed attorney funds to hire a psychiatrist to examine petitioner for the purpose of preparing and presenting mitigating evidence.

28. The trial court denied petitioner a fair sentencing proceeding, in violation of the Due Process Clause of

(Footnote 2—Continued)

the fourteenth amendment, by refusing to grant petitioner a continuance following the rendition of his guilty verdict so as to allow his court-appointed attorney time to prepare for the penalty phase of the trial.

29. Petitioner's death sentence is cruel and unusual, in violation of the eighth and fourteenth amendments, because the trial court refused to grant petitioner a continuance following the rendition of his guilty verdict so as to allow his court-appointed attorney time to prepare for the penalty phase of the trial.

30. The prosecutor denied petitioner a fair sentencing proceeding, in violation of the Due Process Clause of the fourteenth amendment, by peremptorily challenging, during the voir dire examination of the jury venire, every prospective juror having conscientious or religious scruples against capital punishment.

31. The prosecutor denied petitioner his sixth and fourteenth amendment right to a jury representing a fair cross section of the community by systematically excluding, in the exercise of his peremptory challenges, every prospective juror having conscientious or religious scruples against capital punishment.

32. The trial court denied petitioner a fair sentencing proceeding, in violation of the Due Process Clause of the fourteenth amendment, by excusing for cause, during the voir dire examination of the jury venire, persons having conscientious or religious scruples against capital punishment.

33. The trial court denied petitioner his sixth and fourteenth amendment right to a jury representing a fair cross section of the community by excusing for cause prospective jurors having conscientious or religious scruples against capital punishment.

34. The trial court denied petitioner a fair sentencing proceeding, in violation of the Due Process Clause of the fourteenth amendment, by imposing the petitioner's death sentence without considering mitigating evidence.

35. Petitioner's death sentence is cruel and unusual, in violation of the eighth and fourteenth amendments, because it was imposed without the jury's or the court's consideration of mitigating evidence.

(Footnote 2—Continued)

36. The trial court denied petitioner a fair sentencing proceeding, in violation of the Due Process Clause of the fourteenth amendment, by failing to instruct the jury as to the mitigating circumstances disclosed by the evidence.

37. Petitioner's death sentence is cruel and unusual, in violation of the eighth and fourteenth amendments, because the trial court failed to instruct the jury as to the mitigating circumstances disclosed by the evidence.

38. The trial court denied petitioner a fair sentencing proceeding, in violation of the Due Process Clause of the fourteenth amendment, by failing to instruct the jury as to the relationship between aggravating and mitigating circumstances.

39. Petitioner's death sentence is cruel and unusual, in violation of the eighth and fourteenth amendments, because the trial court failed to instruct the jury as to the relationship between aggravating and mitigating circumstances.

40. The trial court denied petitioner a fair sentencing proceeding, in violation of the Due Process Clause of the fourteenth amendment, by failing to instruct the jury that mitigating circumstances could outweigh aggravating circumstances and thus require the jury to recommend the imposition of a life sentence rather than the death penalty.

41. Petitioner's death sentence is cruel and unusual, in violation of the eighth and fourteenth amendments, because the trial court failed to instruct that mitigating circumstances could outweigh aggravating circumstances and thus require the jury to recommend the imposition of a life sentence rather than the death penalty.

42. The trial court denied petitioner a fair sentencing proceeding, in violation of the Due Process Clause of the fourteenth amendment, by failing to instruct the jury that its sentencing recommendation was not advisory but, instead, was binding on the trial court or sentencer.

43. Petitioner's death sentence is cruel and unusual, in violation of the eighth and fourteenth amendments, because the trial court failed to insruct the jury that its

(Footnote 2—Continued)

sentencing recommendation was not advisory but, instead, was binding on the trial court or sentencer.

44. The trial court denied petitioner a fair sentencing proceeding, in violation of the Due Process Clause of the fourteenth amendment, because its charge to the jury indicated that petitioner would not be executed if the jury recommended the death penalty.

45. Petitioner's death sentence is cruel and unusual, in violation of the eighth and fourteenth amendments, because the trial court's charge to the jury indicated that petitioner would not be executed if the jury recommended the death penalty.

46. The trial court denied petitioner a fair sentencing proceeding, in violation of the Due Process Clause of the fourteenth amendment, because its charge to the jury, considered as a whole, was so inadequate as to render petitioner's sentencing proceeding arbitrary and capricious.

47. Petitioner's death sentence is cruel and unusual, in violation of the eighth and fourteenth amendments, because the trial court's charge to the jury, considered as a whole, was so inadequate as to render petitioner's sentencing proceeding arbitrary and capricious.

48. The trial court denied petitioner a fair sentencing proceeding, in violation of the Due Process Clause of the fourteenth amendment, because it gave petitioner a disproportionate sentence, one more severe than the sentences received by similarly situated offenders committing similar homicides.

49. Petitioner's death sentence is cruel and unusual, in violation of the eighth and fourteenth amendments, because it is disproportionate and more severe than the sentences received by similarly situated offenders committing similar homicides.

50. The trial court denied petitioner a fair sentencing proceeding, in violation of the Due Process Clause of the fourteenth amendment, by sentencing petitioner to death on account of his and/or his victim's race, sex, and poverty.

51. Petitioner's death sentence is cruel and unusual, in violation of the eighth and fourteenth amendments,

(Footnote 2—Continued)

because the trial court sentenced petitioner to death on account of his and/or his victim's race, sex, and socio-economic status.

52. The Georgia Supreme Court denied petitioner a fair and adequate proportionality review of his sentence, in violation of the Due Process Clause of the fourteenth amendment.

53. Petitioner's death sentence is cruel and unusual, in violation of the eighth and fourteenth amendments, because the Georgia Supreme Court denied petitioner a fair and adequate proportionality review of his sentence.

54. The State of Georgia will deny petitioner due process of law, in violation of the fourteenth amendment, by putting him to death by electrocution.

55. The State of Georgia will impose cruel and unusual punishment upon petitioner by putting him to death by electrocution.

56. Petitioner was denied the effective assistance of counsel, guaranteed him by the sixth and fourteenth amendments, because his court-appointed attorney failed timely to present claims 12 through 55 above to the Georgia courts.

57. The petitioner was denied the effective assistance of counsel, guaranteed him by the sixth and fourteenth amendments, because his court-appointed attorney failed to move the trial court for a continuance after the rendition of the verdict of guilt so that he could prepare for the sentencing proceedings that followed.

58. The petitioner was denied the effective assistance of counsel, guaranteed him by the sixth and fourteenth amendments, because his court-appointed attorney failed to uncover and present to the jury and sentencing judge available evidence in mitigation.

59. Petitioner was denied the effective assistance of counsel, guaranteed him by the sixth and fourteenth amendments, because his court-appointed attorney failed to order the prosecutor's closing arguments to the jury transcribed for appellate review.

These claims, though not framed precisely as I have stated them, have been exhausted within the meaning of

(Footnote 2—Continued)

28 U.S.C. §§ 2254(b) and (c) (1982). Claims 1, 16, 17, 20, 48, and 50 were presented to and decided by the Supreme Court of Georgia on petitioner's direct appeal from his conviction and death sentence. *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977). Petitioner raised claims 12 through 19, 28 through 33, 48 through 51, 52, and 53 in his petition for a writ of habeas corpus to the Superior Court for Tattnall County, Georgia, on March 7, 1978. That court, after an evidentiary hearing, denied the petition in a written order on August 17, 1978, and the Georgia Supreme Court, on January 11, 1979, refused to issue a certificate of probable cause to appeal. Petitioner presented claims 1, 6, 8, 12, 13, 16 through 20, 32, 48, 49, 52, and 53 to the Chatham County Superior Court (where he had been convicted and sentenced) in an extraordinary motion for a new trial on April 2, 1979. The court denied his motion following an evidentiary hearing on April 13, 1979, and the Georgia Supreme Court affirmed. *Blake v. State*, 244 Ga. 466, 260 S.E.2d 876 (1979). Petitioner's remaining claims were presented to the Georgia courts in his petition for a writ of habeas corpus to the Butts County Superior Court. That court refused to consider these claims on their merits, dismissing the petition as successive on September 2, 1980. The Georgia Supreme Court declined to review this disposition by denying petitioner a certificate of probable cause to appeal on September 4, 1980.

Two of the three claims decided by the district court in this case have never been raised by petitioner in any court. Petitioner did not present them to the Georgia courts or set them forth in his petition to the district court. And he did not raise them at the evidentiary hearing below. They were not articulated, as far as I can discern, until the district court entered the order now before us. Nonetheless, these two claims, (1) that petitioner was denied due process of law because his state-provided psychiatrist's examination and resulting opinion as to his sanity at the time of the offense was inadequate and (2) that petitioner was denied effective assistance of counsel because the State's conduct prevented counsel from developing an insanity defense, must be deemed to have been exhausted for it is clear that the Georgia courts would not hear them on their merits.

hearing, found that three claims had merit and granted the writ.[3] The court expressly declined to rule on petitioner's remaining claims.

It is clear from the district court's dispositive order, and the record, that petitioner did not expressly abandon any of the undecided claims. It is equally clear that the district court did not treat them as abandoned or otherwise dispose of them by, for example, dismissing them without prejudice. We are therefore faced with a case in which the trial court entered a "final judgment" without terminating the litigation.

The majority nonetheless holds that the order before us is a final appealable decision. The only way the majority can do so, in the face of the Supreme Court precedent I have cited, is to say that that precedent only governs habeas cases in which the district court has denied the writ or to view the instant case as presenting only one claim. Neither argument has merit, and I therefore dissent.

I also dissent from the majority's treatment of the merits in this case. Petitioner failed seasonably to present to the Georgia courts two of the three claims the district court decided on the merits; he either asserted them in a "successive" habeas corpus petition or not at all. Because of this "procedural default," the Georgia courts have not and would not now decide these two claims.[4] The district court, and the majority, should have respected Georgia's

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3. *See supra* note 2.

4. *See supra* note 2.

enforcement of its procedural default rule by requiring, as a condition precedent to their entertainment of these particular claims on the merits, petitioner to show "cause" for not bringing them to the state courts in a timely fashion and resulting "prejudice."[5] Petitioner has failed to demonstrate such cause and prejudice; accordingly, the two claims in question should have been denied. As for the merits of those claims, I find repugnant to precedent and to logic the majority's fashioning of new constitutional rules under the sixth amendment's "assistance of counsel" provision and the "fair trial" component of the Due Process Clause in vacating petitioner's conviction in this case. With respect to the third claim the district court

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5. The two procedurally defaulted claims are (1) that petitioner was denied due process of law because his court-appointed psychiatrist's examination and resulting opinion as to his sanity at the time of the offense were inadequate and (2) that petitioner was denied effective assistance of counsel because the State's conduct prevented counsel from developing an insanity defense. These claims were never presented to the Georgia courts, and petitioner did not raise them in his petition to the district court. *See supra* note 2. They first appeared in the district court's memorandum order granting the writ, *Blake v. Zant*, 513 F.Supp. 772 (S.D.Ga.1981).

The majority asserts that petitioner need not show "cause" for failing to present these two claims to the Georgia courts (and thus defaulting them) or resulting "prejudice," *see Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), because the State has not pled petitioner's procedural default as a defense to those claims. The State could not have pled this defense below because the claims did not surface until the district court issued the writ. *See infra* notes 11 and 17. In fact, one could argue that the first claim did not surface until the majority fashioned its opinion. Under these circumstances, I suggest that the important federal-state policies served by the "cause" and "prejudice" rule, *see* Part II.B. *infra*, require us to apply the rule on our initiative.

decided, I would remand that claim to the district court with the instruction that it reconsider the claim under the Supreme Court's decision in *Strickland v. Washington,* — U.S. —, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

I.

The final judgment rule is the dominant rule in federal appellate practice. *Di Bella v. United States,* 369 U.S. 121, 124-26, 82 S.Ct. 654, 656-57, 7 L.Ed.2d 614 (1962). In criminal cases, the insistence upon finality and the prohibition of piecemeal review is particularly important. *Id.,* 82 S.Ct. at 656-57; *see Cobbledick v. United States,* 309 U.S. 323, 324-26, 60 S.Ct. 540, 541-42, 84 L.Ed. 783 (1940). The same is true in habeas corpus proceedings. The Supreme Court stated in *Andrews v. United States* that "[t]he standards of finality to which the Court has adhered in habeas corpus proceedings [is] no less exacting [than in other cases]." 373 U.S. at 340, 83 S.Ct. at 1240. In *Collins v. Miller,* it held that for a judgment to be appealable it must be final "not only as to all the parties, but as to the whole subject-matter and as to all *the causes of action involved.*" 252 U.S. at 370, 40 S.Ct. at 349 (emphasis added). *See also Andrews,* 373 U.S. at 340, 83 S.Ct. at 1240.

In *Collins v. Miller,* the petitioner was being held in federal custody on three extradition warrants based on three separate affidavits. He brought a federal habeas corpus action, and the district court determined that the writ should be denied as to one of the warrants. As to the other two warrants, the court referred the case for further hearing before the district judge who had ordered the petitioner's detention. The Supreme Court concluded that the

district court's order was not a final appealable order because it disposed of only one of petitioner's causes of action. The Court stated: "To be appealable, the judgment must be, not only final, but *complete.*" 252 U.S. at 370, 40 S.Ct. at 349 (emphasis added).

Despite this precedent, the majority finds that the district court's order, disposing of only three[6] of petitioner's claims, or causes of action, is a final order, ripe for appellate review. As stated above, there are only two ways conceivably to square such a holding with this precedent: either the majority feels that this precedent only applies when the district court denies the writ or it views a habeas petition as one claim regardless of the number of discrete constitutional violations the petitioner alleges. Because this second argument is most quickly disposed of, I address it first.

The argument that a habeas petition presents only one "claim" and that the various constitutional errors cited to support the claim constitute merely "grounds"

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6. The majority apparently reads the district court's dispositive opinion as deciding only two claims, both questioning the effective assistance of counsel. This is quite understandable because the district court stated that it was only deciding two ineffective assistance of counsel claims. *Blake v. Zant,* 513 F.Supp. 772, 776 (S.D.Ga.1981). But after demonstrating how the state-appointed psychiatrist's inadequate examination and opinion testimony had rendered petitioner's attorney ineffective, the district court went on to conclude that petitioner's "denial of expert psychiatric assistance was 'effectively a suppression of evidence violating the fundamental right of due process of law.'" *Id.* at 786. I therefore conclude that, in addition to the two ineffective assistance claims it mentioned, the district court also decided one of the due process claims petitioner had alleged, see *supra* note 2, claim 4, though framing it somewhat differently than petitioner did.

for relief cannot be reconciled with Supreme Court precedent or with prevailing case law distinguishing "claims" from "grounds." As I have noted in discussing the Court's decision in *Collins v. Miller,* the petitioner there alleged that his detention, based on the three affidavits, was unlawful because he had been denied the right to present evidence to rebut the affidavits. The court denied the petition as it related to one of the affidavits and referred it to the judge who had ordered the petitioner's detention for further proceedings as to the other two affidavits. The Supreme Court held that each of the three deficiencies petitioner alleged in his habeas petition amounted to a separate claim and dismissed his appeal because only one of his claims had been disposed of by the district court. We should hold similarly here and dismiss this appeal, because fifty-eight of petitioner's claims have not been decided.[7]

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7. The Supreme Court's *Collins* holding puts to rest the majority's contention that an order is final when the relief requested is finally settled. *Ante,* at 525. In *Collins,* the district court's denial of one of petitioner's claims meant that petitioner would remain incarcerated even if the district court were to decide that his other two claims had merit. Despite the fact that petitioner's custodial status could not possibly have been affected by the district court passing on the remaining two claims, the Supreme Court dismissed the case for want of a final order, pending the district court's determination on these two claims. So too here, despite the fact that the district court would have ultimately granted the writ, even if it had found petitioner's remaining 58 claims to be without merit, it was still required to dispose of these claims before the order became final. There is nothing in the Supreme Court's opinion in *Catlin v. United States,* 324 U.S. 229, 65 S.Ct. 631, 89 L.Ed. 911 (1945), cited by the majority to support its final judgment rationale, *ante,* at 525, that would counsel a different result.

In addition, the characterization of the constitutional violations presented in a habeas petition as separate "grounds" rather than separate "claims" is inconsistent with modern case law on this issue. First, it is clear that separate claims may be based on a single set of operative facts. *See Sears, Roebuck and Co. v. Mackey,* 351 U.S. 427, 436, 76 S.Ct. 895, 900, 100 L.Ed. 1297 (1956); 10 C. Wright, S. Miller, M. Kane, Federal Practice and Procedure § 2657 (2d ed. 1983). Thus, although some of petitioner's claims here may have arisen from the same set of operative facts, a characterization of them as "claims" is not negated. Moreover, the position that each constitutional violation presented in a petition constitutes a separate claim is consistent with the oft-cited definition of "claims" stated in *Rieser v. Baltimore and Ohio Railroad Co.,* 224 F.2d 198 (2d Cir. 1955), *cert. denied,* 350 U.S. 1006, 76 S.Ct. 651, 100 L.Ed. 868 (1956). There, the Second Circuit held that "[t]he ultimate determination of multiplicity of claims must rest in every case on whether the underlying factual bases for recovery state a number of different claims *which could have been separately enforced." Id.* at 199 (emphasis added). This definition has been cited with approval by this circuit. *Pitney Bowes Inc. v. Mestre,* 701 F.2d 1365, 1369 n. 8 (11th Cir.), *cert. denied,* — U.S. —, 104 S.Ct. 239, 78 L.Ed.2d 230 (1983). Indisputably, each of the fifty-nine claims presented by petitioner in the habeas petition before us could have been enforced by petitioner in a separate habeas corpus proceeding.[8] Each, therefore, constituted

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8. Of course, the State would no doubt have moved the district court to dismiss every petition subsequent to the first one on the ground the petition was untimely, successive, or an abuse of the writ. *See* Rule 9, Delayed or Successive Petitions, Rules Governing Section 2254 Cases, 28 U.S.C. fol. § 2254 (1982).

a separate claim for relief.[9] which the district court was re-

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9. The 59 constitutional claims stated in petitioner's habeas petition, *see supra* note 2, have a variety of factual bases, some mutually exclusive. For example, one claim challenges on due process grounds the sufficiency of the evidence to support petitioner's murder conviction. Two others challenge the sufficiency of the evidence to support the aggravating circumstance which triggered the imposition of petitioner's death penalty. Eight claims are based on the trial court's failure to provide petitioner's counsel funds to employ an investigator, expert witnesses and a psychiatrist to assist counsel in the preparation and presentation of petitioner's insanity defense during the guilt phase of his trial and mitigating evidence in the sentencing phase. Eight other claims deal with the impaneling of the petit jury; petitioner contends that *Witherspoon* violations occurred and that, in addition, he was denied a jury representing a fair cross-section of the community.

Petitioner attacks the court's jury charge at the close of the sentencing phase of the trial on several discrete grounds, each of which, if valid, would require the vacation of his death sentence. He also attacks his sentencing and the Georgia Supreme Court's review thereof.

Petitioner raises several claims that are not even rooted in his criminal prosecution in the state superior court. He challenges the validity of the Georgia death penalty sentencing scheme on the basis of events that took place in other cases prior to his trial. Finally, petitioner contends that he was denied the effective assistance of counsel because the performance of his court-appointed attorney failed to measure up to the minimum performance required under the Constitution.

It is true that some of petitioner's 59 claims share a common nucleus of facts, or stem from one transaction, and that one could argue that multiple claims stemming from one set of facts or transaction ought to be treated as one claim for our purposes. For example, petitioner alleges a denial of the effective assistance of counsel and of due process in the trial court's refusal to give him funds to hire a private psychiatrist. These are separate claims,

(Continued on following page)

quired to dispose of if it wished to fashion a final appealable order.

Finally, if the majority, in an attempt to support its position that the district court's order was final, were to characterize the habeas petition before us as "one claim," with the fifty-nine constitutional violations petitioner alleges being defined as merely "grounds," it would be required to hold (although it expressly refuses to do so) that a decision of the district court *denying* a writ, because those constitutional errors it chose to consider were without merit, is a final order. For in such a situation the district court would have disposed of the "one claim" presented. To hold otherwise, the majority would be required to define an alleged constitutional violation as a "claim" when the writ is denied, but as a "ground" when the writ is granted. This would defy logic. Moreover, the treatment of a district court order *denying* the writ as final, even though it did not reject all of the petitioner's points of constitutional error as meritless, would directly conflict with the holding in *Collins v. Miller, supra.* The characterization of a habeas petition as one claim is, therefore, unsupportable.

We are thus left with the majority's only argument for reconciling its opinion with the definition of finality

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however. They are not alternative; though their underlying facts are nearly identical, each states an independent claim for relief. But many of petitioner's claims do not stem from a common nucleus of facts or the same transaction. His attacks on the sufficiency of the evidence to support his conviction and on the Georgia death penalty scheme could not be more illustrative of this point. To treat these claims as one would be to ignore the precedent I have cited.

the Supreme Court set forth in *Andrews v. United States* and *Collins v. Miller:* that this precedent was intended to apply only when the district court denies the writ. This argument dissolves, however, when one considers the important federal-state relations policies the final judgment rule fosters in habeas corpus cases; to carve out an exception to the final judgment rule for cases in which the district court grants the writ would do violence to these policies.

Habeas corpus proceedings are, by their nature, disruptive of a state's administration of its system of criminal justice. Until such proceedings have been concluded, they cast doubt on a prisoner's conviction and interfere with the state's administration of its corrections program. Our procedures for handling habeas petitions are designed, in part, to minimize such disruption. For example, our rules discourage untimely and successive petitions, *see* Rule 9, Delayed or Successive Petitions, Rules Governing Section 2254 Cases, 28 fol § 2254 (1982), and we emphasize the importance of litigating *all* of a petitioner's claims in one habeas proceeding, both at the trial and appellate levels. *See Rose v. Lundy,* 455 U.S. 509, 520, 102 S.Ct. 1198, 1204, 71 L.Ed.2d 379 (1982) ("To the extent that the exhaustion requirement reduces piecemeal litigation, both the courts and the prisoner should benefit, for as a result the district court will be more likely to review all of the prisoner's claims in a single proceeding, thus providing for a more focused and thorough review."); *Galtieri v. Wainwright,* 582 F.2d 348, 356 (5th Cir.1978) (en banc).

Obviously, these doctrines facilitate the administration of justice in the federal system as well as in the state's. First, they enable the federal system to conserve judicial

and parajudicial resources, in that the trial and appellate courts need familiarize themselves with a petitioner's case but once. Second, as the Court in *Rose* emphasized, a one-proceeding treatment of a petitioner's case enables a more thorough review of his claims, thus enhancing the quality of the judicial product. In this respect, the petitioner and the state are the primary beneficiaries.

The majority's new final judgment rule will, if implemented, plainly impede the attainment of these important goals. In making this statement I acknowledge that the majority's result in this case appears, initially at least, to achieve these goals: the petitioner will receive a speedy trial and the finality of his state criminal prosecution will be accelerated. I submit, however, that it might not. There is always the possibility that the majority's result will be short-lived; it is subject to reversal by this court sitting en banc or the Supreme Court.

The majority apparently has not considered the mischief its rule will work in cases in which the district court's grant of the writ is reversed.[10] In such cases, the district court, on remand, will have to refamiliarize itself with the petitioner's claims, and it could repeat the process we have here. It could pick and choose among the petitioner's remaining claims and litigate those appearing to be most

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10. In such a case, one might label the court of appeals' treatment of the merits tentative or provisional, especially if the district court, on remand, found, on reconsideration of the record previously compiled or following a new evidentiary hearing, that the facts on which the court of appeals' decision was based differed and called for a different conclusion of law. Tentative or provisional decision making by appellate courts has always been disfavored.

meritorious. If it found one justifying the issuance of the writ, it could, in an effort to conserve time and resources for example.[11] leave the remainder for another day; hence, the tortuous cycle I have described could begin anew.

The foregoing analysis of the majority's new final judgment rule, which could be extended, makes it clear, I suggest, that the Supreme Court would apply its definition of finality, as set forth in *Andrews v. United States* and *Collins v. Miller*, to cases, like this one, in which the district court issues the writ on the basis of one or two of many constitutional claims. Accordingly, we should dismiss this petition for want of jurisdiction.

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11. This is precisely what I believe happened in this case. The allegations of Blake's habeas corpus petition were framed in such a way that it was difficult for the district court to discern what his claims actually were. *See supra* note 2. From what I can determine from the record, the district court did not hold a pretrial conference, or employ any of the other techniques trial judges use to focus or narrow the issues, in an effort to define petitioner's claims. The case simply proceeded to an evidentiary hearing. The hearing was brief. As I indicate in the text *infra*, petitioner's habeas counsel elicited the testimony of petitioner's trial attorney, Reginald Haupt, about the state superior court's policy, at the time of the murder trial, of not providing court-appointed defense counsel with funds to employ a psychiatrist to determine the defendant's sanity at the time of the offense. Habeas counsel also got Haupt to speculate that a privately hired psychiatrist probably would have helped him fashion and establish petitioner's insanity defense. But nowhere during the hearing did the court or, for that matter, the parties seek to define petitioner's claims more clearly. One thing is clear, though; no one articulated the ineffective assistance-due process claims concerning Dr. Bosch's examination and testimony that the district court, and the majority, have seized upon to vacate petitioner's conviction. *See supra* note 5.

II.

Although I am convinced that we do not have a final judgment before us and therefore lack jurisdiction to entertain this appeal, I must address the majority's treatment of petitioner's claims. With respect to the two claims challenging petitioner's conviction, I proceed first to the threshold procedural default—cause and prejudice issue,[12] then to the constitutional rules the majority has fashioned. I would not decide the third claim; it should be remanded for further proceedings.

A.

In his habeas petition to the district court, petitioner presented fifty-nine claims; they are set out in the margin. *See supra* note 2. The district court decided only one of these, that petitioner was denied the effective assistance of counsel because his attorney failed to uncover and present mitigating evidence at the sentencing phase of his trial.[13] The district court also decided two claims petitioner did not present to the Georgia courts or raise in his petition:[14] that petitioner had been denied both the effective counsel and due process of law because, as a direct result of the State's conduct, the court-appointed psychiatrist's examination of petitioner and diagnosis of his mental state at the time of the offense were inadequate. Because these two claims had not been presented to the Georgia courts, the district court's first task, and

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12. *See supra* note 5.

13. *See supra* note 2, claim 58.

14. *See supra* note 2.

ours as well, was to inquire whether the claims could be considered "exhausted," *see* 28 U.S.C. §§ 2254(b) and (c) (1982); for, if they were not, the dismissal of the petition was in order. *See Rose v. Lundy,* 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982) (district courts must dismiss mixed petitions, containing both exhausted and unexhausted claims); *Galtieri v. Wainright,* 582 F.2d 348 (5th Cir.1978) (en banc). This inquiry was not made. Had it been made it would have disclosed that these claims were exhausted, because it is clear that the Georgia courts would no longer consider them.[15] The superior court had already dismissed as successive a habeas corpus petition alleging claims closely akin to these[16] and, the Georgia Supreme Court having affirmed, would undoubtedly dismiss as successive another similar petition. In sum, the district court, after concluding the evidentiary hearing in this case, raised *sua sponte* and without notice to either party[17] two exhausted but procedurally defaulted claims.

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15. For an explanation of the difference between waiver and exhaustion, see *Engle v. Isaac,* 456 U.S. 107, 126-26, 102 S.Ct. 1558, 1570-71, 71 L.Ed.2d 783 (1982), and *Darden v. Wainwright,* 725 F.2d 1526, 1535 n. 13 (11th Cir.1984) (en banc) (Tjoflat, J., dissenting).

16. *See supra* note 2, claims 2 through 5 and 24 through 27.

17. These two claims first appeared in the district court's dispositive order, 513 F.Supp. 772 (S.D.Ga.1981). *See supra* note 5. I find no indication in the record, including the transcript of the evidentiary hearing, that, prior to publishing its opinion, the court gave the parties any notice that it was considering these claims. The State therefore had no opportunity prior to the entry of the court's dispositive order to argue that the court should not consider these

(Continued on following page)

A federal district court cannot entertain the merits of a procedurally defaulted claim on habeas corpus unless the court first determines that the petitioner had a justifiable reason for not having raised the claim in state court. In the case at hand, neither the district court nor the majority has acknowledged this rule. The Supreme Court has spelled out two ways in which the existence of such a justifiable reason can be established. In *Fay v. Noia,* 372 U.S. 391, 438, 83 S.Ct. 822, 849, 9 L.Ed.2d 837 (1963), the Court held that a justifiable reason will be presumed unless the State proves that the petitioner's procedural default constituted a "deliberate bypass" or "knowing waiver" of the state court review process. In *Wainwright v. Sykes,* 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), it held that a petitioner can be excused for not presenting his claim to the state courts if he proves "cause" for his procedural default and resulting "prejudice." The question here is which of these tests should have dictated the district court's treatment of the two defaulted claims the district court and the majority have decided.

In *Fay v. Noia,* the Court held that a defendant who failed to appeal his state court conviction was not barred from prosecuting constitutional claims in a federal habeas action that he could have raised on appeal unless the State established that he had deliberately bypassed or

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procedurally defaulted claims without a demonstration by petitioner of justifiable reason for not having given the Georgia courts an opportunity to pass on them. Of course, the State could have raised this objection, in a Fed.R.Civ.P. 59 motion to the district judge, but it apparently chose to appeal instead.

knowingly waived his right to an appeal. Relying on *Fay,* the Court in *Kaufman v. United States,* 394 U.S.217, 227 n. 8; 89 S.Ct. 1068, 1074-75 n. 8, 22 L.Ed.2d 227 (1969), said that this deliberate bypass test applied where a federal defendant took an appeal but failed to raise the claim he subsequently presented on collateral attack. This deliberate bypass test appears to have applied, with only rare exception,[18] in all procedural default cases until the Court's decision in *Wainwright v. Sykes.*[19]

In *Wainwright v. Sykes,* the Court reexamined the deliberate bypass test. Sykes, the petitioner, had violated Florida's contemporaneous objection rule by failing to object at trial to the introduction of his allegedly involuntary confession into evidence. He first raised his objection when, after an unsuccessful appeal, he moved the state trial court to set aside his conviction. That court

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18. In *Davis v. United States,* 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973), the Court held that the petitioner must show "cause" and "prejudice" before a federal habeas court reviewing an application under 28 U.S.C. § 2255 (1982) will hear a claim with regard to which there had been a Fed.R.Crim.P. 12(b) (2) default (failure to challenge by motion before trial). In *Francis v. Henderson,* 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976), the Court applied the *Davis* rule to the parallel case of a state procedural requirement.

19. *See, e.g., United States ex rel. Kenny v. Follette,* 410 F.2d 1276, 1278 (2d Cir.1969), *cert. denied,* 397 U.S. 940, 90 S.Ct. 951, 25 L.Ed.2d 120 (1970); *United States v. Pinto,* 394 F.2d 470, 474 (3d Cir.1968); *Hale v. Boles,* 419 F.2d 389, 389 (4th Cir.1969); *Pamplin v. Mason,* 364 F.2d 1, 6 (5th Cir.1966); *United States ex rel. Miner v. Erickson,* 428 F.2d 623, 625 (8th Cir.1970); *Curry v. Wilson,* 405 F.2d 110, 111 (9th Cir.1968), *cert. denied,* 397 U.S. 973, 90 S.Ct. 1090, 25 L.Ed.2d 268 (1970).

refused to consider the objection, and thus denied petitioner's motion, on the ground that petitioner had waived it by not timely raising it at trial. On appeal, the Florida Supreme Court affirmed.

Sykes then sought federal habeas corpus review of the validity of his confession. The district court, applying *Fay's* deliberate bypass test, issued the writ, ordering the state trial court to hold a hearing on the voluntariness of his confession. We affirmed. *Wainwright v. Sykes,* 528 F.2d 522 (5th Cir.1976). On certiorari, the Supreme Court held that Sykes could not litigate the merits of his objection in federal habeas proceedings because he had not shown "cause" for failing to comply with Florida's contemporaneous objection rule and "prejudice" resulting from the admission of his confession into evidence. The Court rejected the "sweeping language" of *Fay v. Noia,* which previously might have been thought "to lay down an all-inclusive rule" that state procedural rules were "ineffective to bar review of underlying federal claims in federal habeas proceedings—absent knowing waiver' or 'deliberate bypass.'" *Wainwright v. Sykes,* 433 U.S. at 85, 87-88, 97 S.Ct. at 2505, 2507. The Court, however, did not disturb the application of the *Fay* test to its facts, failure to appeal; it rejected only the deliberate bypass test as it might apply in other contexts. *Id.* at 87-88 n. 12, 97 S.Ct. 2507 n. 12. The Court limited its *Sykes* holding to the facts before it, though, stating, in passing, that it would not "paint with a . . . broad brush" as it had in *Fay v. Noia. Id.*

It is thus clear that the Court in *Wainwright v. Sykes* cut back significantly on the application of the "deliberate bypass," "knowing waiver" test to pro-

cedurally defaulted claims. It is also clear that a petitioner who has failed to comply with a state's contemporaneous objection rule must now demonstrate "cause" and "prejudice" before a federal habeas court can address his objection. The Court has yet to decided explicitly, however, whether the "cause" and "prejudice" test applies in the context here, where a petitioner invokes state remedial procedures but prevents the state courts from passing on his claim by failing to raise it seasonably. There is, however, good reason to believe that the Court, in a case such as ours, would apply the *Wainwright v. Sykes test,* rather than that of *Fay v. Noia.* Chief Justice Burger's concurrence in *Wainwright v. Sykes* and his subsequent opinion for the Court in *Jones v Barnes,* 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983), provide some guidance as to how the Court might resolve this issue.

In his concurrence in *Wainwright v. Sykes,* the Chief Justice stated that the "deliberate bypass," "knowing waiver" test applied only to fundamental decisions, such as whether to waive counsel, plead guilty, waive a jury, testify, or take an appeal, in which the defendant, with appropriate counseling, is competent to and should participate. 433 U.S. at 92, 97 S.Ct. at 2509. In this type of decision, a waiver test can readily, nd feasibly, be applied. These decisions, with perhaps one exception—the decision to testify, are uniformly made after the trial judge has addressed the defendant in open court and are a matter of record, again perhaps with one exception—the decision to appeal. Whether the defendant has waived an objection in these situations is thus an issue that can easily be resolved by consulting the court's record or conducting a brief evidentiary hearing. By contrast, decisions

which are generally entrusted to an attorney, such as what defenses to develop, when to object, which witnesses to examine, and what errors to cite on appeal or in a habeas petition, are either beyond the competence of even a "counseled" layman or must be made so immediately that the defendant could not knowingly and intelligently make a waiver. Thus, to apply the *Fay* test to these situations would be a useless act; for the State could rarely if ever prove a waiver. The *Fay* test is therefore unworkable in these instances.

In *Jones v. Barnes,* the Chief Justice, writing for the Court, expanded on this idea. There, the habeas petitioner claimed that his appellate counsel had been constitutionally ineffective because he had refused to raise on appeal several issues that petitioner felt had merit. The Court denied his claim. Citing his concurrence in *Sykes,* the Chief Justice stated that, although an accused has the right to make certain fundamental decisions, such as whether to plead guilty, waive a jury, testify on his own behalf, or take an appeal, he does not have the right to make his lawyer press certain claims on appeal, even if they are nonfrivolous. *Id.* at —, 103 S.Ct. at 3312. He went on to state that such decisions are a matter of "professional judgment," *id.* at —, 103 S.Ct. at 3314; only counsel has the superior ability to examine the record, research the law and marshal his client's arguments. *Id.* at —, 103 S.Ct. at 3312. Drawing on the *Jones* opinion, one could make a cogent argument that the Court would apply the *Wainwright v. Sykes* "cause" and "prejudice" test to the situation presented in the case now before us because, as the Chief Justice pointed out in *Jones,* wheth-

er to raise a claim on appeal is a decision that only a lawyer is competent to make.

Putting aside, however, the argument that the application of the *Wainwright v. Sykes and Fay v. Noia* tests hinges on the type of "decision" involved, I believe the Supreme Court would apply the former test to the type of procedural default at hand because it provides a superior method for furthering several important federal-state relations goals implicated in habeas corpus proceedings. The *Wainwright v. Sykes* test was fashioned in large part to advance these goals; the *Fay v. Noia* test would frustrate them, especially in the situation here.

State procedural default rules which focus and bear directly on counsel's exercise of professional judgment, serve a salutary purpose in the administration of criminal justice. By requiring counsel to present his objections in an adequate and timely manner or else suffer their waiver, these rules enable the state trial and appellate courts to deal with a litigant's objections at the most ideal moment, when the issue is fresh and the least onerous and costly remedy is available. These rules improve the quality of counsel's professional performance and of justice and bring finality to the cause. It requires no subtle analysis to conclude that the "deliberate bypass," "knowing waiver" test, applied to the briefing or argument of an appeal or the pleading and prosecution of a habeas petition would encourage unethical conduct and "sandbagging" by counsel, deprive the state courts of valuable tools for surfacing and dealing with federal constitutional issues, and make a mockery of the doctrine of finality in state criminal prosecutions. This prospect is, in my view, why we concluded in *Huffman v. Wainwright*, 651 F.2d

347 (5th Cir.1981), that the "cause" and "prejudice" test is applicable to the sort of lawyer decision making the Chief Justice referred to in *Wainwright v. Sykes* and *Jones v. Barnes*. There we held that a state prisoner, absent a showing of "cause" and "prejudice," could not raise a claim in federal habeas proceedings that he had failed to raise in his direct state court appeal from his conviction, in view of a Florida procedural rule that treated such a failure as a waiver.[20]

The procedural default rule the Georgia courts applied in the case at hand, the rule against successive petitions, deserves the same respect we gave the Florida waiver rule in *Huffman v. Wainwright*. Georgia's treatment of successive petitions is by no means peculiar to Georgia; we treat successive habeas petitions similarly. *See* Rule 9, Delayed or Successive Petitions, Rules Governing Section 2254 Cases, 28 fol. § 2254 (1982).

In summary, because petitioner has altogether failed to show either any "cause" for failing to raise in his direct appeal and his first state habeas petition the ineffective assistance and due process claims the district court and the majority have decided and, further, because petitioner failed to present one whit of evidence in the evi-

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20. The Seventh Circuit has similarly held in *Norris v. United States*, 687 F.2d 899 (7th Cir.1982), although the Second Circuit has held that the "deliberate bypass," "knowing waiver" test remains the standard to be applied. *Pacelli v. United States* 588 F.2d 360, 363-65 (2d Cir.1978), *cert. denied*, 441 U.S. 908, 99 S.Ct. 2001, 60 L.Ed.2d 378 (1979).

dentiary hearing below that he was "prejudiced"[21] by the State's failure to appoint or to provide funds for an independent psychiatrist or by the State's failure to ensure that the court-appointed psychiatrist provided an adequate examination and testimony with respect to petitioner's sanity at the time of the offense, these claims should be denied.

B.

The starting point of the majority's analysis of the merits of the first two claims reviewed is that an indigent defendant has a due process right to a psychiatric opinion as to his sanity at the time of the offense for which he stands charged. In this case, the trial judge attempted to accord petitioner that right by appointing a psychiatrist, Dr. Miguel A. Bosch, to examine petitioner to determine both his competency to stand trial and his sanity at the time of the offense. Dr. Bosch examined petitioner and well in advance of trial issued a report in which he stated that petitioner was competent to stand trial. No one takes issue with this opinion. Dr. Bosch also stated, in his report, that he could not determine whether petitioner was sane at the time of the offense. He had been unable to form an opinion on this issue, he said, because, during his examination of petitioner, petitioner told him that he was suffering from a total memory loss; he could not recall any of the events surrounding Tiffany Loury's homicide, even his act of throwing Tiffany off the Talmadge

21. *See infra* text at 549-551. In this case, the prejudice required under the *Wainwright v. Sykes* test is, I submit, the same as that required to prove a sixth amendment-due process claim concerning Dr. Bosch's psychiatric examination and opinion testimony.

Memorial Bridge into the Savannah River. The occasion of Dr. Bosch's examination appears to have been the only time petitioner suffered such a memory loss.

At petitioner's trial, the prosecutor, in the State's case in chief, put Dr. Bosch on the stand.[22] He stated once again that he had no opinion as to petitioner's sanity at the time of the offense. On cross-examination, petitioner's attorney handed him the transcript of a confession petitioner had made shortly after the murder and a suicide note he had given his jailer. Dr. Bosch had not seen either of these documents beforehand. Counsel then asked him if petitioner's utterances in these documents were psychiatrically significant, and he said they were. During the extended colloquy that followed, in which counsel tried to get Dr. Bosch to say that petitioner was insane at the time of the murder, Bosch continued to adhere to his prior statement, that he had no opinion as to petitioner's sanity at the time of the offense.

The majority faults the State for not providing Dr. Bosch, prior to trial, with the transcript of petitioner's confession and suicide note because, as it turned out, the contents of these documents were, as Bosch put it, "psy-

22. The record does not indicate why the prosecutor called Dr. Bosch as part of the State's case in chief; the lawyers' closing arguments to the jury were not made a part of the record in the district court and no explanation appears in the evidentiary hearing held before the district judge. I speculate that the prosecutor simply called Bosch in anticipation of petitioner's defense, to get the insanity issue out of the way early in the trial, although he ran a substantial risk, which indeed materialized, that petitioner's lawyer, having Bosch on cross-examination, could make some points through leading questions that he could not make on direct examination.

chiatrically significant." To remedy this conduct, both here and in future cases, the majority fashions the following constitutional rule. Whenever the court appoints a psychiatrist to determine the defendant's sanity at the time of the offense, the State becomes obligated to provide the psychiatrist, on its own initiative, with any information that might prove to be psychiatrically significant on the sanity issue, and this obligation continues throughout the criminal prosecution.[23] To ensure the

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23. The majority makes this point unambiguously clear. It states that "[t]he judge's order of a psychiatric examination placed a duty upon the prosecution to provide [Dr. Bosch] and the defense with the transcript of [petitioner's] confession and . . . suicide note" even though the defense had not requested such provision, citing *United States v. Agurs*, 427 U.S. 97, 96 S.Ct. 2392, 49 L.Ed.2d 342 (1976), and *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *Ante* at 532 n. 10. The prosecutor breached this duty, according to the majority, simply by withholding evidence from the psychiatrist which was "psychiatrically significant." *Ante* at 531 n. 8.

Brady and Agurs, I submit, are inapposite in this context. First, they deal with evidence "favorable to the defense"; I have considerable difficulty concluding that "psychiatrically significant" material is evidence favorable to the defense. Second, assuming the applicability of this precedent, I would not hold a prosecutor to have denied a defendant due process by failing to produce the defendant's own statements, especially where, as here, the defendant has made no request for his statements or even for evidence favorable to the defense.

The majority states that the prosecutor's failure to provide the defense and Dr. Bosch the materials in question "is indicative of bad faith on the part of the prosecution." *Ante* at 532 n. 10. Petitioner has never charged the prosecution with bad faith, and petitioner produced no evidence of bad faith. Prosecutorial bad faith is, simply, not an issue in this case.

State's compliance with this rule, the majority holds that, if the State fails to provide the psychiatrist psychiatrically significant information as to the defendant's sanity at the time of the offense, defense counsel will be deemed ineffective as a matter of law and the defendant's conviction must be set aside.[24]

The district court, and the majority, have fashioned this rule and remedy out of their concern that the defendant receive a fair trial. In this case, they have concluded that petitioner's trial was rendered unfair because Dr. Bosch did not have the withheld information sufficiently in advance of testifying to enable him to give it the sort of deliberate consideration the majority thinks was necessary. They have drawn this conclusion purely from *their own lay assessment* of what was, and is, vital to the rendition of an expert psychiatric opinion of the specie Dr. Bosch was asked to give. I say this because there is nothing whatever in the record indicating that Bosch would have testified any differently than he did had the State made the information in question available to him at an earlier time.[25]

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24. The majority's rule would seem to apply in *all* cases in which the defendant's guilt turns on his mental status at the time of the offense. If the State withholds "psychiatrically significant" evidence from a psychiatrist hired to determine the defendant's mental capacity to commit the crime, what difference should it make whether the psychiatrist is court appointed, hired with State funds, or privately employed by the defendant; the question is, under the majority's test, whether the defendant's trial was unfair in a due process sense because, in the federal habeas court's opinion, the psychiatrist's examination and resulting opinion were "inadequate."

25. The majority has acknowledged this point: "We, of course, do not know whether the psychiatrist, if he had these

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Dr. Bosch's opinion was that he could not say with the requisite certainty (the law requires for expert psychiatric opinion testimony to be probative) whether the defendant was sane or insane at the time of the offense. Contrary to what I perceive to be the majority's view, this constituted an opinion on the issue. It is not unusual for a psychiatrist, or any other expert, to say that he cannot form an opinion about an event he did not witness or experience. The majority observes that "Dr. Bosch was under a court order to express an opinion as to Blake's sanity at the time of the offense." *Ante* at 532. That may be, but a court cannot *order* an expert witness to give an opinion that he simply cannot give without doing violence to his professional judgment and integrity. It requires no citation of authority to say that competent, well-informed psychiatrists are sometimes unable to say whether a defendant was insane when he committed his crime.

Petitioner has shown no prejudice of any kind resulting from Dr. Bosch's examination and opinion testimony. He has never presented any testimony, or even a proffer, from Dr. Bosch—to the Georgia courts or to us—to the effect that he was insane at the time of the offense. Nor has he presented the testimony, or proffer, of any other psychiatrist, psychologist, or even a lay person, that he was insane. Surely petitioner could have made such a presentation.

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statements [i.e., the withheld information] before him and an opportunity further to question the accused, would have found them accurately to state [petitioner's] belief and, if so, whether he would have determined that [petitioner] was insane at the time of the act." *Ante* at 530.

A psychiatric opinion as to petitioner's mental or emotional state at the time of the offense, whether given by Dr. Bosch or anyone else, would have to be based on a hypothetical question, since the witness would have no personal knowledge of the criminal episode and thus could not testify about it absent an assumed set of facts. Petitioner was, and is, the only living witness to the murder of Tiffany Loury. Petitioner, alone, was, and is, in control of the facts of the crime. Even today, Dr. Bosch presumably could respond to a hypothetical question as to petitioner's sanity; Bosch could add whatever facts petitioner cared to have him assume, including the statements contained in his confession and suicide note, to the findings he made when he examined petitioner and attempt to formulate an opinion as to whether petitioner was sane or insane when he committed the offense. Thus, there is no need in this case conclusively to presume prejudice, as the district court and majority have done, either on the ground that the cost of establishing prejudice, or a lack thereof, at this date is too great or it is incapable of demonstration. There are other reasons, however, why we should require the petitioner to show prejudice in a case of this sort. A brief review of the events that took place between the murder, on November 15, 1976, and the trial, which began on February 13, 1977, makes this clear.

The murder occurred at the end of an evening of bar hopping during which petitioner and the victim's mother had been quarreling. According to the evidence adduced at trial, petitioner kidnapped and killed Tiffany Loury either to get even with her mother or to save Tiffany from her parents, who, petitioner testified, were unfit to raise her. The first reason was quite plausible, for petitioner had pre-

viously threatened to kill his two-year-old son, in front of his seven months pregnant wife, the mother of the child, because she had spurned him. He did not carry out this threat; instead, he stabbed his wife.

The record does not inform us as to when the court appointed attorney Reginald Haupt to defend petitioner, but I assume that it was well before December 3, 1976, when Dr. Bosch examined petitioner at the Central State Hospital at Milledgeville, Georgia, pursuant to the trial court's order. The court apparently entered the order at Haupt's request, although we do not know whether the court took this action because Haupt filed a special plea of insanity[26] or because he informally requested the examination. The record is also silent as to when Haupt learned that his client had confessed to the murder.

What we do know is that Dr. Bosch, following his psychiatric examination, issued a report containing the opinions I have mentioned and a statement that petitioner declined to tell him anything about the murder; petitioner told Bosch that he could not recall the event. It is clear that attorney Haupt received a copy of that report considerably in advance of trial, but we do not know what communication he may have had with Dr. Bosch thereafter.

Though the record is silent on some of these matters, one thing is clear to me; that is, by the time the trial began Haupt was well prepared to try the guilt phase of the case and to present petitioner's insanity defense. Haupt's opening statement, his cross-examination of the State's

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26. *See generally* Ga.Code §§ 27-1502 and 27-1504 (1976) (superseded by Ga.Code Ann. § 17-7-130 (1982)).

case—especially Dr. Bosch—and his direct examination of petitioner during his presentation of the defense's case indicate to me that Haupt had consulted with petitioner, had prepared to examine Dr. Bosch, and knew full well the limitations of his insanity defense.

The following facts, in particular, argue forcefully against the presumed prejudice the majority embraces. After Dr. Bosch testified on cross-examination (by Haupt) that he had not considered the transcript of petitioner's confession and his suicide note (because they had not been given to him) when diagnosing petitioner's mental condition at the time of the offense, Haupt did not request a continuance or even a brief recess to allow Bosch to ponder over the new information; instead, he proceeded with his questioning. Haupt obviously felt it in his client's best interest to proceed; had a continuance been granted to allow Dr. Bosch more time to reflect, Bosch may well have concluded that petitioner was sane at the time of the offense. By foreclosing this damaging scenario from occurring, counsel was able to get Bosch to say that he could not render an opinion with reasonable certainty and to concede that petitioner might have been insane if what he said in his confession was true.

It is also important to note that, when Dr. Bosch left the witness stand, the defense did not ask him to remain in the courtroom to hear the evidence[27] or to make himself

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27. Frequently, trial judges waive the witness sequestration rule to allow an expert to observe the proceedings. Later, when the expert is called to testify, he can use any pertinent information he has observed in formulating his opinion testimony, thus perhaps rendering unnecessary the lengthy, convoluted, and typically argumentative, hypothetical questions lawyers would otherwise be forced to utilize.

available to testify as a defense witness. Mr. Haupt could have conferred with Dr. Bosch further and then, after petitioner took the stand and revealed the details of the murder, elicited Dr. Bosch's opinion as to petitioner's sanity at the time of the offense. Conceivably petitioner's courtroom revelations could have formed the basis of a more complete hypothetical question to the psychiatrist than the one Haupt put to him earlier, in the State's case in chief. Counsel chose not to pursue this course, however. Once again, he apparently did not want to run the risk of possibly damaging opinion testimony.

We should not presume prejudice in a situation such as this because of the extent to which *the defendant* has control over the issue. First, as here, the defendant may choose not to tell the psychiatrist anything, especially about the crime.[28] Second, his lawyer can keep the psychiatrist in the dark about the facts of the crime and would have every incentive to do so once the psychiatrist has said that the defendant is competent to stand trial and was either sane or of questionable sanity at the time of the offense. For all we know, that occurred here. Third, the defense can ask for a continuance or a recess to give the

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28. Indeed, under the fifth amendment privilege against compelled self-incrimination, a defendant has a constitutional right to refuse to submit to a psychiatric examination, unless he raises the issue of sanity and introduces supporting expert psychiatric testimony of his own. *Estelle v. Smith*, 451 U.S. 454, 465-66, 101 S.Ct. 1866, 1874, 68 L.Ed. 2d 359 (1981). If a defendant were to invoke this privilege, the State, under the majority's rule, would be found to have denied the defendant due process of law and effective assistance of counsel if it was later found that the State had withheld any phychiatrically significant information from the examining psychiatrist.

psychiatrist time adequately to consider the newly disclosed "psychiatrically significant" evidence and to eliminate the fairness problem the majority perceives.

Another reason why prejudice should not be presumed is that the burden such a presumption would place on the State would be intolerable. The State has to marshal at its peril the "psychiatrically significant information" on the insanity issue. It must divine what is and is not pertinent, and it must do so until the trial is over.[29] To satisfy the State's burden, the prosecutor must have continuous access to the psychiatrist, and he must compare the psychiatrist's information with his to ensure that the psychiatrist has all the facts.

If the foregoing practical and policy considerations do not counsel the rejection of the majority's position, then I suggest that Supreme Court precedent does. *United States v. Cronic*, — U.S. —, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), and *Strickland v. Washington*, — U.S. — , 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), decided the same day, reiterate the long standing rule that prejudice is an indispensable element of an ineffective assistance of counsel claim, except in those few situations where the State's conduct has operated to deny the defendant his right to counsel altogether or has undermined his lawyer's performance to such an extent "that the trial cannot be relied on as having produced a

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29. This conclusion is implicit, if not explicit, in the majority's discussion of the prosecutor's duty to provide the defense and defense psychiatrist with material that may have a bearing on the accused's state of mind. *Ante* at 532 n. 10. Arguably, the prosecutor's duty extends beyond the issue of the accused's sanity at the time of the offense to the issues of his competency to stand trial and the sentence to be imposed.

just result." *Washington,* 104 S.Ct. at 2064. We cannot presume that this occurred in petitioner's case; accordingly, were I to reach the merits of the claims under examination, I would reject them for want of prejudice.[30]

C.

The district court concluded that Reginald Haupt denied petitioner effective assistance of counsel in the sentencing phase of the case. Haupt's performance, the court found, was woefully inadequate because he did not prepare in any way to present mitigating evidence in petitioner's behalf. He "was not functioning as the 'counsel' guaranteed [the petitioner] by the Sixth Amendment." *Washington,* 104 S.Ct. at 2064. This portion of the court's holding is on sound footing; Haupt admitted that he was unprepared for the sentencing phase.

Having reached this conclusion, the district court next determined whether a showing of prejudice was necessary. It is at this point that the court erred. The court observed that "a credible, if hardly overwhelming showing of prejudice" had been made out because mitigating evidence was available and was not presented. *Blake,* 513 F.Supp. at 780. It refused to engage in "nice distinctions" about the effect such mitigating evidence might have had, however, concluding that it was sufficient that "[c]ounsel's conduct was clearly not 'harmless beyond a reasonable

30. A final observation should be made about the sweep of the majority's new rule. The majority implies that its new rule is limited to those cases in which the defendant's sole defense is the defense of insanity. In practically every case in which the defendant pleads insanity, that is his only defense. The new rule therefore will apply in virtually every insanity defense case.

doubt.'" *Id.* at 781. As the majority correctly observes, "[t]he district court determined that Haupt's error was prejudicial *per se.*" *Ante* at 533.

The fact that defense counsel failed to develop and present to the sentencer (the jury in this case) mitigating evidence does not create a presumption, much less a conclusive presumption, that the defendant was prejudiced. *Strickland v. Washington,* 104 S.Ct. at 2064. The majority agrees. *Ante* at 533-534. Rather, the defendant must demonstrate that there is a "reasonable probability that, but for counsel's unprofessional errors, the results of the proceedings would have been different." *Id.* 104 S.Ct. at 2068. A court cannot find such a "reasonable probability" without weighing the mitigating evidence against the aggravating evidence that supports the imposition of the death penalty. Because the district court failed to perform this essential task, I would remand this ineffective assistance claim for reconsideration under *Washington's* test.[31]

31. The majority, on its own initiative, has weighed the aggravating and mitigating evidence in this case and concluded that the "probability that [petitioner] would have received a lesser sentence but for his counsel's error is sufficient to undermine our confidence in the outcome." *Ante* at 535. This, in my view, constitutes appellate fact finding, a function the Supreme Court has cautioned us not to perform. *See Pullman-Standard v. Swint,* 456 U.S. 273, 102 S.Ct. 1781, 72 L.Ed.2d 66 (1982).

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 81-7417

JOSEPH JAMES BLAKE,

Petitioner-Appellee,

versus

RALPH KEMP, Warden,
Georgia Diagnostic Center,

Respondent-Appellant.

Appeal from the United States District Court for the
Southern District of Georgia

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion March 29, 1985, 11 Cir., 198—, ——F.2d——).

(MAY 13, 1985)

Before TJOFLAT and CLARK, Circuit Judges and TUTTLE, Senior Circuit Judge.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.
ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

APPENDIX C

Joseph James BLAKE, Petitioner,

v.

Walter ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent.

Christopher A. BURGER, Petitioner,

v.

Walter B. ZANT, Warden, Georgia Diagnostic and Classification Center, Respondent.

William Neal MOORE, Petitioner,

v.

Charles BALKCOM, Warden, Respondent.

Nos. CV480-251, CV280-114 and CV478-309.

United States District Court, S. D. Georgia, Savannah and Brunswick Divisions.

April 29, 1981.

Habeas corpus petitions were filed by three prisoners who had been sentenced to death. The District Court, E. Avant Edenfield, J., held that: (1) first petitioner's right to at least one psychiatric examination and opinion developed in a manner reasonably calculated to allow adequate review of relevant, available information and at such a time as would permit counsel reasonable opportunity to utilize analysis in preparation and conduct of the defense,

was violated; (2) sentencing phase of second petitioner's trial was flawed in a way that may have prevented an informed process of jury deliberation and appellate review; and (3) constitutional mandates were not observed in appellate review of third petitioner's sentencing, and thus petitioner's sentence of death could not be sustained.

Ordered accordingly.

Millard Farmer, Joseph M. Nursey, Andrea I. Young, Atlanta, Ga., for petitioners Blake & Burger.

H. Diana Hicks, Nashville, Tenn., for petitioner Moore.

Susan V. Boleyn, Charles E. Brown, William B. Hill, Jr., Atlanta, Ga., for respondents.

ORDER

B. AVANT EDENFIELD, District Judge.

The Court this date enters the attached Orders in these habeas corpus capital punishment actions. Each case is unique, and, accordingly, each Order has been developed and is intended to be construed individually. Moreover, many broad questions which these cases might suggest have been reserved for possible future consideration in other contexts. Nonetheless, I am fully cognizant of the unique public concern which attaches to cases such as these. The Court also recognizes their broader significance in the development of law in this field and particularly with respect to United States Supreme Court decisions like *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), which in fact extensively discusses the Georgia Supreme Court's analysis in *Blake v. State,* 239 Ga. 292, 236 S.E.2d 637 (1977). Furthermore, the Court

concludes that, precisely because these cases do present varied legal and factual questions, they offer a valuable opportunity for general comment on the development of the law of capital punishment. The Court also believes that its own experience in considering these cases may provide some useful insight into the practical possibilities and limitations of judicial review in this unique field.

Accordingly, the Court attaches, as an appendix to these Orders, certain broad comments on the problems and, in this Court's view, likely outcome of this on-going process of judicial and legislative development. Of course, these comments are, and must be, general and to some extent tentative, though they are certainly not unconsidered. Thus, I in no way intimate any settled view as to issues which may be presented to the Court in some future proceeding. Nor do these reflections constitute any part of the bases for the Court's holdings with respect to the individual habeas petitions.

CV480-251

Before the Court is a petition for writ of habeas corpus for review of the judgment of the Superior Court of Chatham County, Georgia, and the conviction and sentence of death imposed upon the petitioner. Numerous arguments have been raised by petitioner, but the Court will review only two in detail here: petitioner's allegations of ineffective assistance of counsel, (1) in both the guilt and sentencing phases of trial because of a lack of expert psychiatric opinion in the development and presentation of his defense of insanity, and (2) at the sentencing phase of trial because of counsel's failure to consider or develop possible mitigating circumstances. For reasons

discussed below, the Court finds that both of these arguments must be sustained. Therefore, petitioner's conviction and sentence of death will be vacated, and the case remanded for new trial on all issues, or release, within 120 days.

Background

Petitioner Joseph James Blake was tried in the Chatham County Superior Court for the murder of Tiffany Lowery, a two-year old child and the daughter of Jacquelyn Lowery whom Mr. Blake had been seeing for some time. The child was killed November 15, 1975. Petitioner was brought to trial and convicted February 14, 1976. The death penalty was imposed February 18, 1976. Conviction and sentence were both upheld by the Georgia Supreme Court in *Blake v. State,* 239 Ga. 292, 236 S.E.2d 637 (1977). Petitioner then filed for certiorari to the Supreme Court of the United States. This motion was denied November 14, 1977. *Blake v. Georgia,* 434 U.S. 960, 98 S.Ct 492, 54 L.Ed.2d 320 (1977).

On March 7, 1978, petition for writ of habeas corpus was filed in the Superior Court of Tattnall County. A hearing was held on May 24, 1978, with the petition denied by an Order of August 17, 1978. Petitioner's application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia on January 11, 1979.

Petitioner also filed a motion for extraordinary relief which was heard in the Superior Court of Chatham County on May 13, 1979. Subsequently, this motion was denied and denial affirmed by the Georgia Supreme Court on October 16, 1979. *Blake v. State,* 244 Ga. 466, 260 S.E.2d 876 (1979). Petitioner then filed for writ of certiorari

in the United States Supreme Court seeking review of the denial of this extraordinary motion. This petition was denied June 2, 1980, with rehearing also denied on August 11, 1980.

Thereafter, a second state habeas corpus petition was filed in the Superior Court of Butts County. This action was dismissed as successive on September 2, 1980.[1] The Georgia Supreme Court denied application for certificate of probable cause September 4, 1980. On September 5, 1980, this Court granted a stay of execution, to permit consideration of the present petition for habeas corpus relief, which was also filed September 5, 1980.[2] A hearing was conducted on December 12, 1980. The respondent presented no evidence at this hearing. However, testimony was received from certain witnesses for petitioner, notably Mr. Reginald Haupt, Jr., who represented the petitioner at trial and subsequently in all other steps through denial of extraordinary relief by the Georgia Supreme Court. The Court also entertained argument at this hearing, and by prior written memoranda.

Facts

The circumstances leading up to the death of Tiffany Lowrey are generally not in dispute. In November, 1975, Jacquelyn Lowery and the decedent child were living with her mother, Mrs. Florence Smith, and several of Mrs.

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1. Under Georgia law, any further efforts to obtain habeas corpus relief would surely be dismissed as well. Ga.Code Ann. § 50-127(10). Thus, it appears that state remedies have been exhausted.

2. Petitioner filed a similar action in this Court on March 28, 1979. On January 24, 1979, the Court allowed voluntary dismissal of this suit.

Smith's other children. Jacquelyn and Mr. Blake had dated for about nine months and planned to be married. The petitioner asked Jacquelyn to go out with him the evening of November 14, 1975, but she told him that she planned to go out with a girlfriend, Denise Walker, instead. Nonetheless, Mr. Blake persisted and, finally, after meeting her at the Walker home, Jacquelyn agreed to let the petitioner take her out drinking.

Jacquelyn's mother kept Tiffany while Jacquelyn, Ms. Walker, the petitioner and several other persons went first to one bar and then another. During the course of the evening, a dispute developed between Mr. Blake and Jacquelyn, perhaps because of her interest in another man. Petitioner struck Ms. Lowrey on the side of the head with his fist. He was ejected from the lounge at that time and again around midnight when he tried to return.

Mrs. Smith testified that Tiffany and the other children had gone to bed shortly after 9:30 p. m. Mrs. Smith left the house to visit friends around 10:15 p. m. and returned about two hours later. She then noticed that the window next to the front door had been opened, and the curtains pulled back. However, Mrs. Smith did not believe anything was seriously amiss at that time. At approximately 1:00 a. m., Mr. Blake called Mrs. Smith. He asked whether Jacquelyn was home. When told that she was not, Mr. Blake informed Mrs. Smith that he had taken Tiffany. Mrs. Smith began scolding him for having the child out so late on a cold evening. Mr. Blake then hung up without saying anything more. However, it does not appear that Mr. Blake's having the child was in itself a source of major concern. He had taken the child out alone

several times in the past, and his relations with her as well as the rest of the family had been good.

Petitioner testified that, after he had been thrown out of the bar the second time, he had gone back to Jacquelyn's home. When no one answered, he opened the window, unlocked the door, and entered. He found everyone except Tiffany aslep. Mr. Blake testified that he asked Tiffany if she wanted to go with him. She agreed and they left by the back door. Mr. Blake indicated that his intention was to take the child away because her mother did not deserve the child and had mistreated her in a variety of respects.

Mr. Blake testified further that he first intended to run away with Tiffany and, accordingly, crossed the Talmadge Memorial Bridge as the quickest exit route. Mr. Blake stated that he drove as far as Buford, South Carolina. However, he realized at some point that he could not simply run away with the child without being chased by the authorities. Initially, he reacted to this fact by deciding to kill himself and Tiffany there in Buford. Petitioner later decided to return to Savannah. He testified that he stopped on the bridge. There he and Tiffany prayed about going to "another world" and being together forever "on the other side." Petitioner then dropped the child off the bridge to her death, which occurred on impact or very shortly thereafter.

Mr. Blake explained that he postponed his own trip to "the other side" so that he could tell the child's mother what had happened and why. Thus, petitioner did not in fact make any effort to conceal his actions. Quite the opposite, he contacted the police almost immediately after

the incident, and began giving them substantially the same account of Tiffany's death that he testified to at trial, emphasizing that "I know I did wrong, but in another way I did right," T. 139, while never once indicating that he thought that the child had been harmed or killed. T. 147.

Arguments Presented

Petitioner here has raised numerous arguments as grounds for relief with respect to the guilt-innocence phase of the trial, as well as the sentencing proceeding. Several of these arguments relate to ineffective assistance of counsel. In particular, petitioner asserts constitutional error in that his attorney (1) failed to have closing arguments transcribed; (2) failed to prepare properly for the sentencing phase of trial; and, (3) did not and could not obtain expert psychiatric assistance in the development and presentation of the defense of insanity. Petitioner alleges constitutional error in several other respects as well: (1) that the jury's discretion in passing sentence was not sufficiently guided by the trial court's instruction and statutory language, particularly that relating to "depravity of mind" as an aggravating circumstance; (2) that petitioner was prejudiced at both stages of the trial by introduction of evidence of a prior misdemeanor conviction which was not relevant to his guilt or permissible as an aggravating circumstance; and (3) that the jury did not believe that their finding would lead to petitioner's execution. More generally, petitioner argues (1) that administration of the death penalty in the manner prescribed in Georgia is unconstitutionally cruel and particularly so here in view of petitioner's present mental disability; (2) that the death penalty is inflicted arbitrarily under

Georgia law; (3) that infliction of the death penalty is based on impermissible factors such as race, sex, and poverty; (4) that no theoretical justification for the death penalty exists; and, (5) that persons having scruples against capital punishment were improperly excluded from the trial jury. Because the Court finds petitioner's second and third arguments with respect to ineffective assistance of counsel determinative, only these issues will be considered below.

Analysis

(1)

The Court will consider first whether Mr. Blake was afforded constitutionally adequate representation in the sentencing portion of his trial. The circumstances surrounding this proceeding were testified to in some detail at the December hearing in this case. Mr. Haupt indicated that he represented the petitioner as a court-appointed attorney. Mr. Haupt is an experienced trial lawyer having defended in as many as a hundred or more capital cases. However, Mr. Haupt testfied that, as was then his custom, he did not prepare in any way to present mitigating factors in the event petitioner was convicted Counsel explained that he had not proceeded to trial expecting or planning for the conviction which did come. Of course, in other cases where no bifurcated procedure was involved, Mr. Haupt's policy would have created no problem. And according to Mr. Haupt, under present policies of the Chatham County Superior Court, this approach would also have been adequate, because a continuance is generally permitted to allow preparation for the sentencing phase of trial. However, when Mr. Blake was tried, the custom was to proceed directly to the question of sentence. Thus, Mr. Haupt

testified that, when the jury went out after closing arguments, he could "feel" that a verdict of guilty was likely. During the jury's deliberations, he approached the trial judge and asked for a continuance to prepare for the sentencing phase. In line with prevailing policy, he was told that no continuance would be granted.

Thus, even though no formal motion appears on the record, Mr. Haupt's uncontradicted testimony is that he was forced by his own strategy and court policies to proceed to sentencing with no prior preparation or consideration whatsoever. No witnesses had been interviewed and no thought given to how counsel might show the jury "something good" about Mr. Blake. Mr. Haupt merely presented oral argument presumably not much different from that which had already failed in the prior phase of trial. No evidence in mitigation was presented, though the trial court did indicate that a psychiatrist's report which was already in evidence could be considered by the jury.

[1, 2] The broad legal standard for evaluating performance of counsel in this or other contexts is easily articulated. A defendant is entitled to an attorney likely to render and, in fact, rendering reasonably effective assistance, whether that attorney be retained or court-appointed. *Kemp v. Leggett,* 635 F.2d 453 (5th Cir. 1981). This standard is, of course, to be applied with particular care in capital cases. See *Voyles v. Watkins,* 489 F.Supp. 901, 910 (N.D.Miss. 1980); *Smotherman v. Beto,* 276 F. Supp. 579, 586 (N.D.Tex.1967). As the United States Supreme Court has noted, death is a unique penalty "both in its severity and its finality. . . . It is of vital importance to the defendant and to the community that any decision

to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner v. Florida,* 430 U.S. 349, 357-58, 97 S.Ct. 1197, 1204, 51 L.Ed. 2d 393 (1977) (Stevens, Stewart, Powell, J.J.). Furthermore, the importance of the attorney's role does not diminish at the sentencing stage. Quite the opposite, "sentencing in a critical stage of criminal proceeding at which [the defendant] is entitled to effective assistance of counsel." *Id.* at 358, 97 S.Ct. at 1204. Effective assistance at this stage requires "zealous, and not merely perfunctory or pro forma representation." *Voyles, supra,* at 912.

[3] In the present case, this Court is confronted with conduct that falls far short of the requirement that reasonably adequate assistance in fact be rendered. Mr. Haupt's, uncontradicted testimony establishes that through a combination of his own lack of foresight and trial policies which have since been abandoned, substantially no effort was made to prepare any defense for the petitioner in the sentencing phase of trial. To be sure, there is no reason to conclude that Mr. Haupt did not attempt or, in fact, accomplish a reasonably cogent argument before the jury. *Cf. Voyles, supra,* at 912. However it is apparent that this argument could do little more than repeat what had already proven ineffective once before. Mr. Haupt in no way used or even considered additional evidence which might have been available to support the defendant's cause. Such a performance hardly comports with the notion that the sentencing phase be in fact a distinct procedure where the jury's attention is focused not just on the circumstances of the crime, but also on "special facts about this defendant that mitigate against imposing capital punishment (e. g., his youth, the extent

of his cooperation with the police, his emotional state at the time of the crime)." *Gregg v. Georgia,* 428 U.S. 153, 197, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1975) (Stewart, Stevens, Blackmun, Powell, JJ). Counsel's failure to make distinct preparation here is particularly significant in light of the fact that "much of the information that is relevant to the sentencing decision may have no relevance to the question of guilty, or may even be extremely prejudicial to a fair determination of that question." *Id.* at 190, 96 S.Ct. at 2933.

There is authority for the proposition that ineffective assistance of counsel need not be grounds for new trial without some additional showing that prejudice resulted. In *Davis v. Alabama,* 596 F.2d 1214 (5th Cir. 1979), vacated as moot 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980),[3] the court required a demonstration of harm arising through counsel's failure to develop a possible insanity defense. However, *Davis* also makes clear that a showing of prejudice is not always required. "The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice resulting from its denial." *Glasser v. United States,* 315 U.S. 60, 76, 62 S.Ct. 457, 467, 86 L.Ed. 680 (1942). The Supreme Court has apparently never applied the harmless error doctrine to a case involving in-

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3. Of course, the Supreme Court's action technically removes any precedential value from *Davis. See, e.g., United States v. Sarmiento-Rozo,* 592 F.2d 1318, 1321 (5th Cir.1979). However, the case remains useful "as the most pertinent statement of the governing law even if it is not directly binding." *County of Los Angeles v. Davis,* 440 U.S. 625, 646, 99 S.Ct. 1379, 1391, 59 L.Ed.2d 642 (1979) (Powell, J. dissenting).

effective assistance of counsel, and, in fact, several recent cases do not even inquire into prejudice. See *Geders v. United States,* 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976), *rev'g. United States v. Fink,* 502 F.2d 1 (5th Cir. 1974); *Herring v. New York,* 422 U.S. 853, 95 S.Ct. 2550, 45 L.Ed.2d 593 (1975); *Holloway v. Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). See also *Davis, supra,* at 1221-22. Furthermore, the Court has held that, when a defense attorney puts on what amounts to no defense at all, it would "not stop to determine whether prejudice resulted." *Hamilton v. Alabama,* 368 U.S. 52, 55, 82 S.Ct. 157, 159, 7 L.Ed.2d 114 (1961).

The present case closely approaches a siutation where effectively no defense at all was presented at the sentencing phase. To be sure, there was some effect from the prior cross-examination of the state's psychiatrist, Dr. Bosch, though this was in itself seriously inadequate for reasons to be discussed shortly. Similarly, Mr. Haupt's argument may have had some persuasive value. But, the uncontraverted evidence now before this Court establishes that Mr. Haupt simply made no independent effort to develop facts which might have established "something good" about Mr. Blake.

Nonetheless, petitioner has made a credible if hardly overwhelming showing of prejudice. Several witnesses presented at the December hearing indicated that they knew the petitioner and would have testified in his behalf. These or other witnesses might conceivably have demonstrated to the jury that the petitioner was not the totally reprehensible person they apparently determined him to be. Certainly, they would have provided some counter-

weight to evidence of bad character which was in fact received. In any event, this Court is unwilling to engage in "nice distinctions" concerning what witnesses might have been available and precisely what testimony might have been given to what effect. Now, five years after petitioner's trial, such fine calculations simply do not seem realistic. Petitioner has demonstrated that no favorable evidence was sought and that some was in fact available. This showing seems to the Court sufficient to support a new trial on the issue of sentence. Counsel's conduct was clearly not "harmless beyond a reasonable doubt." *Davis, supra,* at 1221, *quoting Chapman v. California,* 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967).

(2)

Petitioner's allegation that effective assistance of counsel was denied by his attorney's inability to obtain expert psychiatric advice and testimony is a source of particular concern to the Court. There is no question that the sanity of the petitioner was seriously in issue in this case. The very circumstances of the crime may be seen as creating real doubt as to Mr. Blake's mental competence. Thus, on *voir dire,* the prosecution consistently asked potential jurors "Do you have any idea, any preconceived idea, that a person that would do something like this has got to be insane?" V.D., at 14. And, in fact, one potential juror was excluded because he was of the opinion that "anybody who would drop a baby off the Talmadge Bridge has got to be mentally deranged." V.D., at 6. Furthermore, in his opening statement, the prosecutor specifically indicated that "the State's case and a lot of the evidence you will hear will be directed toward the idea

of motive and giving you an explanation of why this happened." T., at 4. Counsel indicated that the state intended to show "a basis, a rational basis behind his (Mr. Blake's) actions," T., at 7; and, Mr. Haupt joined the issue, claiming that "you will not find any rationalization; you will not find any rational basis or (sic) anything that occurred in the incident which you are about to try." T., at 8.

In this case, virtually the sole substantial issue at trial was the sanity of the defendant when the homicide occurred. This was well-recognized by both sides. It was also well-appreciated by the trial court which in fact ordered a psychiatric examination of Mr. Blake. This examination was performed under then-prevailing policies for indigent defendants in Chatham County. Mr. Blake was taken to Central State Hospital in Milledgeville, Georgia, for examination in the state-operated facility for the criminally insane.[4] The stated purposes of this examination were to determine: (1) the defendant's psychiatric condition at the time of the crime; (2) whether the defendant was competent to stand trial; (3) recommendations which might be appropriate, presumably for the defendant's treatment; and, (4) any mitigating circumstances which might be present. T., at 109. The exact nature and extent of the examination which was performed is not easily determined from the present record. However, it appears that it included a personal interview with Dr. Miguel A. Bosch, director of the Forensic Psychiatric

4. According to Mr. Haupt's testimony at the evidentiary hearing, this policy has been changed within the last two years to permit appointment of a psychiatrist at public expense.

Center (the maximum security hospital) who then prepared a report which was the basis of his testimony at trial.

Relying upon his interview with the defendant, and perhaps other information, Dr. Bosch testified that

> based upon on my examination and evaluation, what I saw it, to me this man is not suffering from a psychotic condition. He's not suffering from what is called a schizophrenia reaction, paranoid type. He is not suffering from what is called a manic psychosis. He doesn't have that kind of illness. He does have problem; he does have—again; he was upset, he was having financial difficulty. . . .

T. 118. Dr. Bosch thus concluded that the defendant was not insane at the time of the interview. However, Dr. Bosch also found that Mr. Blake was then suffering from a "reactive-depressive condition" which the doctor attributed to his obviously difficult position. Dr. Bosch described this condition as involving feelings of guilt, depression, and tension as well as loss of memory and concentration, bad dreams, and other manifestations of distress. T. 91.

In sum, Dr. Bosch found that Mr. Blake did have significant psychiatric problems, but that Mr. Blake was not at the time of the examination mentally incompetent. However, Dr. Bosch's testimony on petitioner's mental condition at the time of the incident and before is in striking contrast. On cross-examination, Dr. Bosch acknowledged that neither he nor, so far as he knew, any physician had examined Mr. Blake prior to the incident. He also indicated that some or all of Mr. Blake's symptoms might have been present before Tiffany was killed. T. 98.

Dr. Bosch acknowledged that Mr. Blake had told him of having vivid hallucinations at least since being admitted to the hospital. Most important by far, Dr. Bosch acknowledged the accuracy of his own report when it concluded that "[a]s for him [Mr. Blake's] mental condition at the time of the alleged offense, we would like to state that no opinion could be reached regards to his condition at that time." T. 109.

Dr. Bosch explained the absence of findings on this critical issue by stating that he "couldn't get any information from him. He claimed he had no memory of doing anything wrong. He said he lacked memory about the particular incident." T. 124. As I have already indicated, it is not clear from the record whether Dr. Bosch interviewed petitioner on more than one occasion, though it appears that his report and his testimony dealt with only a single contact with Mr. Blake. T. 90-91, 93.[5] However, even had the petitioner been unable to recall the incident when he spoke with Dr. Bosch, prosecutors had available

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5. Mr. Blake testified that he had indeed been unable to discuss the incident with Dr. Bosch at the time of their first meeting. However, petitioner stated that he had later been taken back to Dr. Bosch at his own request and discussed the incident at length. While the Court draws no conclusion concerning whether any such interview occurred, it is interesting to compare Dr. Bosch's statement here that petitioner "had no memory of doing anything wrong" with Mr. Blake's transcribed statement to police that "[w]herever Jacquelyn comes, I want to talk to her to believe I'm telling the truth cause seems like nobody wants to believe me. When I don't do anything I'm guilty for." T. 140. Thus, it appears that Dr. Bosch did somehow acquire at least limited knowledge of petitioner's view of the incident. Of course, this does not alter the fact that Dr. Bosch could provide no opinion of petitioner's sanity at the time of the incident.

the transcription of a taped confession which Mr. Blake gave at approximately 10:45 a. m., November 15, or only about eight hours after the homicide. T. 102. This statement described in some detail Mr. Blake's impression of what he had done and why. Moreover, it was completed long before the petitioner had seen an attorney or anyone else who might have been able to "coach" him on the elements of the legal defense of insanity. Inexplicably, neither the tape nor the transcription were provided to Dr. Bosch. Instead, he was given only the police report of the incident, a document which apparently did not provide any direct insight into the petitioner's mental state at the time of the incident. T. 98.

Dr. Bosch's only analysis of the defendant's mental condition at the time of the crime—the only expert analysis which has ever been conducted on this central issue—took place at trial, on the witness stand when Mr. Haupt showed him the transcription. Preliminarily, Dr. Bosch indicated that, if the defendant had known what he was doing when he threw Tiffany off the bridge and if the defendant believed that the conduct was "right," in these circumstances, Mr. Blake would be considered insane. T. 101. After reading the transcript, Dr. Bosch readily acknowledged that Mr. Blake appeared to be "upset." Dr. Bosch further stated that according to Mr. Blake's statement, he was indeed doing "something right . . . something that he have to do it (sic)." T. 103. Finally, addressing the question of Mr. Blake's sanity, the following occurred:

> Dr. Bosch: There is, as far as I'm concerned there is to me after reading this, I just can't tell you that was insane or was sane. Nobody can tell you from reading this dissertation that this particular man got to be

sane or got to be insane. Just after reading this . . .

Mr. Haupt: Would you suspect insanity?

Mr. Ryan (the prosecutor): Your Honor, if it pleases the court, that's sort of probing the dark, isn't it?

Dr. Bosch: Like I said, I suspect that this is a man who is upset and who may have an emotional problem or who may have some real problem. But, when you're talking about insanity, that's different from an emotional problem or being upset.

T. 104.

Examination of Dr. Bosch continued for some time. This examination revealed several other points of particular interest. Dr. Bosch admitted that, even though he had previously testified that the defendant had begun hallucinating only after being admitted to the hospital, his own psychiatric report indicated that Mr. Blake had stated that the problem had existed since petitioner sustained a head injury about six years before. Dr. Bosch indicated that such a condition, if established, might well signify brain damage. Furthermore, Dr. Bosch stated that hallucinations often compelled their victims to act. Mr. Haupt also showed Dr. Bosch a note sent by Mr. Blake to the investigating police detective in the case prior to an attempted suicide at the jail, which failed apparently only because the rope Mr. Blake had fashioned broke. This note substantially repeated petitioner's story that Tiffany was waiting for him on "the other side," while declaring that the time had come for him to join her. T. 114. Again, this was apparently Dr. Bosch's first and only examination of the note. But, he did affirm that a bona fide suicide attempt would indicate that Mr. Blake believe his hallucinations. T. 117. Dr. Bosch acknowledged that

such a belief would be symptomatic of genuine insanity, rather than mere emotional upset. T. 118.

Dr. Bosch's testimony also occasioned this colloquy concerning how and why his opinions had been so late in coming and based on such limited information, even relative to that which was in the hands of the prosecution:

Mr. Ryan: Your question was that he was not asked to do that (determine sanity at the time of the incident). His answer was he was asked to do it, but he could not test that.

Mr. Haupt: Well, he had no material.

Mr. Ryan: Well, that may be true.

Mr. Haupt: I have the court order to ask for that question.

The Court: You didn't send him any material, did you?

Mr. Haupt: Well, Judge, I didn't even have it (the transcription). I didn't know this was here until yesterday.

The Court: All right, well, he's seen that now.

Mr. Haupt: That's why I wanted him to look at it and to read it.

Mr. Ryan: You still can't use an opinion.

The Court: Well, he can't say one way or the other about his opinion. He says he was upset.

T. 110. Dr. Bosch's testimony concluded without change in the basic points already outlined: (1) Petitioner did not appear to be insane in the doctor's view when examined; (2) Petitioner had not discussed the incident so far as to permit formulation of an opinion regarding his prior sanity; and (3) brief perusal of materials first supplied at

trial did not permit any firm conclusion; but, (4) these statements, if sincere, were sufficient to establish that the petitioner was in fact insane at the time of the incident. No other expert testimony was received on the question of petitioner's mental condition though there was an indication from the officer who first met Mr. Blake after the incident that petitioner appeared to be "reasonably sane." T. 82.

Several other points were developed through Mr. Haupt's testimony at this Court's evidentiary hearing. Mr. Haupt indicated that at the time of petitioner's trial, a court-appointed attorney was not permitted funds for appointment of a private psychiatrist to examine his client. Mr. Haupt testified that he personally sought such authority from the trial judge in private conversation, but was told that only a state-employed psychiatrist would be provided and, further, that formal motion for private examination would be both unwelcome and unavailing. Mr. Haupt also testified that the financial circumstances of Mr. Blake's family were too limited for him to ask for their assistance and that his personal experience with local physicians had convinced him that no useful testimony or examination could be obtained without payment. Thus, he made no effort to obtain the assistance of a private psychiatric expert.

With respect to Dr. Bosch, Mr. Haupt made several criticisms. Mr. Haupt stated and the trial record confirms that Dr. Bosch received his initial medical training in Cuba, though it also appears that he had completed substantial training in the United States and been properly certified to practice psychiatry in this country. T. 87.

Mr. Haupt also alleged that Dr. Bosch had serious difficulty in comprehending questions on the witness stand, which had hampered cross-examination and perhaps the examination of Mr. Blake as well. Counsel further stated that he considered Dr. Bosch biased for the prosecution because of his position as an employee of the state and a consultant to the Department of Offender Rehabilitation. Mr. Haupt stated that he believed a private physician at least would have provided "a little bit more in depth psychiatric examination" which would have been useful to the defense at both stages of trial.

The circumstances surrounding Dr. Bosch and his testimony present the Court with numerous issues. Certain of petitioner's allegations seem clearly unsupported by the record. Quotations from Dr. Bosch's testimony have already suggested that his command of the English language is not perfect. Other passages might easily be found to confirm this impression.[6] However, the Court finds no indication that his understanding was so deficient as to prevent effective cross-examination. Nor was any

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6. For example, Dr. Bosch described procedures involved in examination of the petitioner as follows:

> The examination that was carried out was divided into two parts. One, the physical examination and then the psychiatric examinations. The following physical examination that shows that he is in good physical health . . . And, the psychiatric examination, this is carried out under a personal interview with the patient. And, to solve the mental illness or this emotional problem would be revealed by this psychiatric examination. It was given a diagnosis of what is called a reactive-depressive condition. And, we referred to a condition that was brought about by his arrest and consultation with the charges.

T. 90-91.

evidence presented to support the view that Dr. Bosch was unable to converse with the petitioner effectively. Similarly, no competent evidence was presented which would establish actual prosecutorial bias on the doctor's part, as opposed to a mere appearance or possibility of such attitudes.

[4, 5] The Court concludes that Dr. Bosch's personal characteristics and professional connections might reasonably have led Mr. Haupt to select another expert to examine petitioner had the choice been afforded. However, the Court does not find evidence sufficient to support a determination that fair and adequate expert opinion could not be obtained from Dr. Bosch. Similarly, this Court does not believe that a procedure for examination of indigent defendants at public facilities is necessarily so prejudicial to the defendant's rights as to fail constitutional scrutiny. *Satterfield v. Zahradnick,* 572 F.2d 443 (4th Cir. 1978). Nor does the Court believe that an indigent defendant is entitled to repeated psychiatric examination after substantial competent evidence has already been obtained. *United States ex rel. Smith v. Baldi,* 344 U.S. 561, 73 S.Ct. 391, 97 L.Ed. 549 (1953); *McGarty v. O'Brien,* 188 F.2d 151 (1st Cir. 1951). Obviously, such a holding would allow defendants to engage in endless searches for the "right" diagnosis with considerable expense to the public and only dubious contributions to the legitimate ends of justice.

[6] However, in the present case, this Court does not find only objection to a particular psychiatrist or to use of publicly employed psychiatrists *per se.* Similarly, petitioner does not advance any demand for multiple opinions in the face of already abundant evidence. Here, it

appears that no expert opinion at all was received on the central issue of the petitioner's mental state at the time of the alleged crime. It further appears that almost no lay opinion on this critical issue was received. To be sure, this extraordinary situation may be attributed in some part to the defendant's memory lapse. Moreover, this lapse might even be ascribed to a conscious effort to avoid diagnosis. T. 181. Nonetheless, Dr. Bosch testified that Mr. Blake was suffering from genuine mental problems at the time of the interviews, and, that these problems included loss of memory and concentration. In such circumstances, the Court cannot easily conclude that Mr. Blake's memory lapse was intentional.

Moreover, it is obvious that the state made little or no effort to supply Dr. Bosch and apparently Mr. Haupt as well with such information as the defendant had already voluntarily provided. The state's failure to produce the transcript of November 15, 1975 was hardly cured by events at trial. Careful anlysis of the defendant's statement would surely require more than a single reading. Yet this one reading was apparently the only expert analysis of the petitioner's obviously quite bizarre account of the incident that has ever occurred. The Court finds such analysis wholly inadequate, especially where there is little or no indication that serious efforts were made to obtain petitioner's own first-hand statement after the initial interview had failed. Given petitioner's willingness to discuss the incident on many other occasions, there is no obvious basis for believing that such efforts would have been futile.

The Court finds that, in this case, reasonable efforts were not made to examine the petitioner with respect to

his sanity at the time of the alleged crime. The Court further concludes that, even were it impossible to interview the petitioner directly with respect to the incident, reasonable efforts were not made to provide Dr. Bosch with alternative means for consideration of the petitioner's condition. Consistent with this determination, the Court must also conclude that Mr. Haupt was not provided with adequate expert assistance in the preparation of his case. Apparently, he was afforded no professional opinion on the question of Mr. Blake's sanity at the time of the incident until Dr. Bosch's comments were received on the witness stand at trial. At this point, with the presentation of evidence more than half complete and the theory of his defense already outlined for the jury, it was obviously too late for any significant benefit.

The exact parameters of an indigent defendant's constitutional right to expert assistance in the preparation of his defense have not yet been fully developed. *Hoback v. Alabama,* 607 F.2d 680 (5th Cir. 1980). "The right to counsel is an expanding concept in a developing jurisprudence in the sense that new are being brought within its scope as they are reached factually. *Hintz v. Beto,* 379 F.2d 937, 943 (5th Cir. 1967). However, the courts have "long recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." *United States v. Edwards,* 488 F.2d 1154, 1163 (5th Cir. 1974). Thus, in *Bush v. McCollum,* 344 F.2d 672 (5th Cir. 1965), the court upheld habeas corpus relief where a defendant had been sentenced to life imprisonment without benefit of psychiatric testimony. The court thus approved the following language:

> In order for Bush in the instant case to have the effective aid of counsel, it was necessary for his counsel to have the assistance of a qualified psychiatrist and a trial, without expert evidence as to sanity, which found him sane and resulted in a life sentence is so lacking in fairness as to be a denial of liberty without due process of law, contrary to the Fourteenth Amendment.

231 F.Supp. 560, 565 (N.D.Tex.1964).

Bush makes clear that the requirement of expert assistance is not met by hasty, inadequate examination any more than the requirement of representation by counsel can be met by placing a warm body at the defense table. In *Bush,* the defendant was in fact briefly examined by a qualified psychiatrist on two occasions. Nonetheless, the court found that testimony based on these interviews was "not sufficient to permit the jury to form a meaningful judgment as to whether Bush was sane. . . ." 231 F.Supp. 564. Moreover, in *Bush,* the court based its determination that the examination was inadequate upon the opinion of the petitioner's expert witness. In the present case, the inadequacy of the examination, and the impossibility of forming a proper professional opinion were directly admitted by the state's witness and the only expert who has ever testified on defendant's mental condition. Certainly, there can be no doubt that Dr. Bosch's contacts with the petitioner fell far short of the minimal requirement announced in *Bush* that the "examination conducted by the psychiatrists must be of a character they deem sufficient for the purpose of determining the facts required." 231 F.Supp. 564, *quoting Williams v. United States,* 250 F.2d 19 (D.C.App.1957).

This Court is not prepared to conclude, based on the present record, that responsibility for failure to provide complete psychiatric assistance lies solely with the trial court or the prosecution. I am by no means convinced that, if Mr. Haupt had brought the lack of psychiatric information to the attention of the Court prior to trial, arrangements would not have been made for additional examination. Nor is this Court prepared to conclude that Mr. Haupt made all reasonable efforts to provide Dr. Bosch with materials concerning the petitioner which may have been in his possession. However, I do not find it necessary here to precisely delineate the roles of the various actors in this unfortunate chain of events. The significant point is not what caused this situation but the situation itself. Whatever the source of the circumstances I discuss here, it is apparent that the denial of expert psychiatric assistance was "effectively a suppression of evidence violating the fundamental right of due process of law." *United States v. Pate,* 345 F.2d 691, 695 (7th Cir. 1965). Furthermore, it is apparent that adequate time for preparation was not afforded to counsel for the petitioner. "Time for preparation, where mental competency is in question and there is a fair factual basis as here for the question would at least include a reasonable time within which to have a defendant examined and for preparation of such defense as might be based on the facts developed by the examination." *Hintz v. Beto,* 389 F.2d 937, 941 (5th Cir. 1967). Furthermore, this consideration is due even where the report finds the defendant sane. *Id.* In *Hintz,* time was found inadequate when the defense obtained a report on the morning of trial. Here, the only expert analysis which was received came *during* trial, and, at that, provided no firm conclusion or careful discussion.

Finally, the Court must consider whether prejudice to the petitioner resulted from the absence of expert assistance in the preparation and conduct of his defense. As was indicated above, such a showing has not always been required with respect to ineffective assistance of counsel.[7] Moreover, the present facts do not necessarily appear to fall within the narrow exception to this rule where defense counsel failed to investigate leads favorable to his client. *Davis v. State of Alabama,* 596 F.2d 1214 (5th Cir. 1980). While Mr. Haupt may indeed have failed to protect Mr. Blake's interests in adequate examination with proper zealousness, this case does not involve any mere isolated action or inaction by the defense counsel. Mr. Blake's trial was in all its essentials a sanity proceeding with the subject's very life hanging in the balance. It seems to this Court difficult if not impossible to say what arguments, or theories, or defenses might have been developed with

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7. In *Mason v. Arizona,* 504 F.2d 1345 (9th Cir.1974), the court applied the same standard applicable to a request for experts in a federal criminal proceeding under 18 U.S.C. § 3006A(e) to state proceedings. Thus, the court required that a habeas petitioner show (1) that counsel had made as complete a showing of necessity as could reasonably be expected in the circumstances and (2) that prejudice resulted from the denial of such assistance. Considering this approach in *Pedrero v. Wainwright,* 590 F.2d 1383 (5th Cir.1979), the court indicated that "decisions in this circuit, however, strongly suggest that prejudice will be presumed if the petitioner shows that the matter on which he needed the assistance of experts was seriously in issue." 590 F.2d, at 1391, n.9. Of course, here sanity was "seriously in issue" and presumably the need for assistance was adequately demonstrated pursuant to the request for the evaluation which Dr. Bosch attempted. Yet, no adequate examination or opinion was ever received, as the trial court explicitly recognized. T. 110.

adequate expert assistance. Mr. Blake received the benefit of no expert help in the preparation of his defense and none in the testing of the prosecution's case. These circumstances seem to the Court to amount to a situation where essentially no defense at all is presented and, hence, no showing of prejudice required. *Hamilton v. State of Alabama,* 368 U.S. 52, 55, 82 S.Ct. 157, 159, 7 L.Ed.2d 114 (1961); *Davis v. State of Alabama, supra.* Alternatively, the Court finds that prejudice has been shown here where (1) sanity is clearly in issue; (2) statements are in evidence which if understood and accepted by the jury would appear to constitute a legal defense; and (3) no firm expert opinion on the import of these statements was received.

Conclusion

As I have already indicated, the exact dimensions of an indigent's right to expert assistance have not yet been fully developed. A recent decision of the Fifth Circuit has suggested that this right may be substantially identical to the right of defendants to expert opinion and assistance pursuant to *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). *See Hoback v. State of Alabama,* 607 F.2d 680, 681, n.2 (5th Cir. 1979). Under *Brady,*

> [f]undamental fairness is violated when a criminal defendant . . . is denied the opportunity to have an expert of his own choosing . . . examine a piece of critical evidence whose nature is subject to varying expert opinion . . . The evidence must be both "critical" and "subject" to carrying (sic) expert opinion . . . 'Critical evidence' is material evidence of substantial probative force that "could induce a reasonable doubt in minds of enough jurors to avoid conviction."

Gary v. Rowley, 604 F.2d 382 (5th Cir. 1979), *quoting* from *Barnard v. Henderson,* 514 F.2d 744 (5th Cir. 1975) and *White v. Maggio,* 556 F.2d 1352 (5th Cir. 1977). Obviously, Mr. Blake's account of the incident would seem to readily meet these requirements. Thus, if this standard were to be applied, the failure of the Court to appoint "an expert of his own choosing" would in itself amount to a constitutional violation.

[7] However, in the present case, it is unnecessary to go nearly so far. Here, the Court need hold only that, in a capital case, a defendant whose sanity at the time of the alleged crime is fairly in question, has *at a minimum* the constitutional right to at least one psychiatric examination and opinion developed in a manner reasonably calculated to allow adequate review of relevant, available information, and at such a time as will permit counsel reasonable opportunity to utilize the analysis in preparation and conduct of the defense. I so hold. I hold further that these rights were violated in the present case in a manner and to a degree that requires reversal of both the conviction and sentence returned against the petitioner. I further conclude that retrial on the issue of sentence is independently required in the present case by counsel's substantially total failure to prepare and present a defense at this stage of trial.

Petitioner is therefore remanded to the Superior Court of Chatham County for retrial or release within 120 days.

So Ordered.

APPENDIX

I

Debate over the proper statutory and procedural means for imposition of capital punishment long antedates even the discovery of America.[1] Echoing Exodus 21:12-13, the laws of Alfred provided:

> Let the man who slayeth another willfully perish by death. Let him who slayeth another of necessity or unwillingly, or unwillfully, as God may have sent him into his hands, and for whom he has not lain in wait be worthy of his life and of lawful but if he seeks an asylum.

Quoted in 3 J. Stephen, History of the Criminal Law of England 24 (1883). The statute of Gloucester, 6 Edw. 1, c9 (1278), provided that in cases of self-defense or misadventure the jury should neither convict nor acquit, but should find the fact specially, so that the King might decide to offer a pardon, as he generally did in such situations. Indeed, the familiar if hardly simple concept of "malice aforethought" emerged in the sixteenth century as yet another attempt to separate homicides which merited capital punishment from others which did not. 3 *Id.*, at 46-73.

This development did not cease in America. The early history of this country reflects a broad aversion to the common-law rule which imposed a mandatory death sentence on all convicted murderers. In 1794, Pennsylvania

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1. The historical analysis developed below has been drawn largely from *McGautha v. California,* 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1970).

abolished capital punishment except for "murders of the first degree," which included all "willful, deliberate, and premeditated" killings, and for which death remained mandatory. Pa.Laws 1794 c.1777. Virginia and many other states adopted similar reforms thereafter. Nonetheless, they, like the notion of malice aforethought, proved inadequate. Notions of "degree" of fault soon became little more than "mystifying cloud(s) of words." B. Cardozo, What Medicine Can Do For Law, In Law And Literature 70, 100 (1931). Moreover, juries often simply refused to follow these statutes in situations where capital punishment was clearly required but it was nonetheless considered inappropriate for one or another reason. *See Andres v. United States,* 333 U.S. 740, 753, 68 S.Ct. 880, 886, 92 L.Ed. 1055 (1948) (Frankfurter, J., concurring).

This problem of jury nullification might have been met by increasingly specific statutory guidance. However, legislatures did not follow this course. Instead, the general response was to explicitly grant juries the discretion they already exercised in fact. *See* Knowlton, Problems of Jury Discretion in Capital Cases, 101 U.Pa.L.Rev. 1099, 1102 and n.18 (1953). In 1897, federal law was changed to reflect this view. Act of Jan. 15, 1897, c.29, § 1, 29 Stat. 487. Thus, in *Winston v. United States,* 172 U.S. 303, 19 S.Ct. 212, 43 L.Ed. 456 (1899), the Supreme Court considered whether a federal jury should be required to find mitigating circumstances before it could return a recommendation of mercy. The court concluded that such a requirement would conflict with legislative intent that the sentencing determination should be left exclusively to the jury:

> How far considerations of age, sex, ignorance, illness or intoxication, of human passion or weakness, of sym-

pathy or clemency, or the irrevocableness of an executed sentence of death, or an apprehension that explanatory facts may exist which have not been brought to light, or any other consideration whatever, should be allowed weight in deciding the question whether the accused should or should not be capitally punished, is committed by the act of Congress to the sound discretion of the jury, and of the jury alone. 172 U.S., at 313, 19 S.Ct., at 215. *See also, Andres, supra,* 333 U.S., at 743 68 S.Ct., at 881.

Finally, in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the court offered a more general discussion of the role of the jury in death cases. The court observed that, in capital proceedings, juries "do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death." *Id.,* at 519, 88 S.Ct., at 1775 (footnote omitted). The jury's main function and value was thus defined as "to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Id.,* at 519 n.15, 88 S.Ct., at 1775 n.15 (citation omitted).

II

The problem of jury discretion in capital sentencing is then anything but new. Moreover, it is not a novel problem for the judiciary. Constitutional challenges to jury discretion date from at least the *Winston* decision in the late nineteenth century. However, recent decades have brought a new perspective to this ancient struggle between specifying law and jury discretion. Whereas law was once seen as a means to force reluctant juries to do their duty and im-

pose capital sentences, more recently law has emerged as a favored means to control juries which were considered too ready to impose death. Thus, in *McGautha v. California,* 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1970), the court considered whether the "untrammeled discretion" of the trier of fact was so "fundamentally lawless" as to deprive the accused of life without due process. Writing for the court, Justice Harlan first noted the many lower courts which had considered and uniformly rejected such arguments. 402 U.S. 196, n.8, 91 S.Ct. 1461, n.8. Noting further that "a strong showing [is required] to upset this settled practice of the nation on constitutional grounds," *Id.,* at 203, 91 S.Ct., at 1465, Justice Harlan went on to conclude that statutory control of jury discretion was neither constitutionally mandated nor practically possible:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty and to express those characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.
>
> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.
>
> The infinite variety of cases and facets to each case would make general standards either meaningless 'boilerplate' or a statement of the obvious that no jury would need.

Id., at 204, 207, 208, 91 S.Ct., at 1465, 1467.

McGautha is, however, notable also as an exposition of the contrary view. Thus, Justice Brennan, in a dissent joined by Justices Marshall and Douglas, concluded that the Constitution did not permit

> capital sentencing procedures that are purposely construed to allow maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice.
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> *Id.*, at 248, 91 S.Ct., at 1487.

Describing existing procedures as the "unguided, unbridled, unreviewable exercise of naked power," Justice Brennan opined that state law was constitutionally required to provide guidelines sufficient to control the "arbitrary and capricious" exercise of sentencing power. Drawing on a variety of cases, several dealing with state administrative actions, Justice Brennan concluded that

> State procedures are inadequate under the Due Process Clause unless they are designed to control arbitrary action and also to make meaningful the otherwise available mechanism of judicial review.
>
> *Id.*, at 268, 91 S.Ct., at 1498.

Of course, it is this latter view which prevailed only a year later in *Furman, supra.* In fact, the language such as that quoted above from *McGautha* has become a staple of the many more recent Supreme Court considerations of capital punishment. For example, in *Godfrey,* the plurality opinion notes that state statutes

> must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance' and that 'make rationally reviewable the

> process of imposing a sentence of death.' 446 U.S., at 428, 100 S.Ct., at 1764. *See also Gregg, supra,* 428 U.S. at 195, n.45, 96 S.Ct., at 2935, n.45 (Stewart, Powell, Stevens, JJ.).

Thus, for approximately the last decade, the Supreme Court has mandated a process of statutory development designed to achieve what *McGautha* found "beyond present ability." If the states are to have capital punishment at all, they must develop procedures which make it "regular and reviewable," so as to provide a "meaningful basis for distinguishing the few cases in which [the] penalty is imposed from the many in which it is not." *Furman, supra,* at 313, 92 S.Ct., at 2764.

III

As was noted initially, the passage of now approximately a decade since *Furman* and the specific facts of *Blake, Burger,* and *Moore* seem to this Court to provide a useful occasion for considering whether recent Supreme Court decisions have led to state laws which do promote rational jury decisions and effective appellate review, instead of the "meaningless boilerplate" or bromides which Justice Harlan warned against. More particularly, they provide an important opportunity for considering the developing role of the judiciary, state and federal, in administering these new statutory attempts to meet the requirements suggested in *McGautha* and announced in *Furman.*

Furman and its progeny may be seen as mandating, in effect, three levels of constitutional protections for the accused in a capital case. There is, of course, in the first place, the broad "umbrella" of due process which is accorded any defendant in criminal proceedings. Thus, this

Court considered in *Blake* whether the constitutional guarantee of the assistance of counsel was violated by a trial in which sanity was the major issue and yet little, if any, competent expert testimony was received. In this context, the Court was, of course, not limited to considering only capital cases. In fact, many of the decisions which were relied upon did not involve the death penalty. *See e. g., Bush v. McCollum,* 344 F.2d 672 (5th Cir. 1965). The fact that a capital sentence was at issue might properly have figured in the Court's evaluation of questions such as whether error is to be considered harmless, but it obviously did not create the rights under discussion.

There is, of course, no disagreement as to the propriety of judicial supervision in such matters as these. Whatever one's evaluation of the constitutional requirements for capital punishment, no one doubts that the courts must "insure that the rights of a defendant are scrupulously respected," and, that in capital cases particularly, the courts "must see to it that the jury has rendered its decision with meticulous care." *Godfrey, supra,* 446 U.S., at 443, 100 S.Ct., at 1772 (Burger, C. J., dissenting). Serious controversy develops only when one moves beyond the broad protections due criminal defendants generally to the far more specific and far less commonplace procedural and substantive considerations mandated by *Furman* and succeeding cases. Here one reaches the exceedingly difficult problems of statutory construction discussed in *McGautha.* One also confronts the still more difficult question of whether the "rational review" process mandated by *Furman* can be seen as improving on initial jury determinations or merely "secondguessing" them. *See Godfrey, supra,* at 451, 100 S.Ct., at 1776 (White, J., dissenting).

This Court has now had occasion to consider the first of these twin concerns in the specific context of *Burger.* Of course, after *Gregg* there is no doubt that the Georgia statute is facially constitutional under the mandates of *Furman.* There is, however, much room for doubt as to whether this statute in fact escapes the problems foreseen in *McGautha.* In *Gregg,* the plurality described the benefits of the Georgia's statute as follows:

> No longer can a Georgia jury do as Furman's jury did . . . Instead, the jury's attention is directed to the specific circumstances of the crime: Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that might mitigate against imposing capital punishment (e. g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime).
>
> 428 U.S. at 197, 96 S.Ct., at 2936 (Stewart, Powell, and Stevens, JJ., citing *Moore v. State,* 233 Ga. 861, 865, 213, S.E.2d 829 (1975)).

This limited analysis is at best disturbing. The announced purpose of *Furman* was, after all, to separate those few who deserved capital punishment from the many, including, of course, Mr. Furman, who did not. Nonetheless, the Court is all but silent on how a very broad, general listing of factors such as the Georgia statute might promote, much less produce "rational" results. Such a conclusion is hardly obvious in light of the fact that Furman himself would readily qualify for execution because his homicide was committed

in the course of a capital crime, armed robbery. Similarly, there is no suggestion as to how or why isolating the jury's attention on a factor like greed (murder "committed for the purpose of receiving money or any other thing of monetary value," Ga.Code Ann. § 27-2534.1(b)(4)), would tend to separate the deserving from the undeserving. Again, Mr. Furman might be said to merit death by this criteria, even though *Furman* holds such a sentence unconstitutional based on a record which specifies few, if any, mitigating circumstances in the character of the defendant. *Furman, supra,* 408 U.S., at 294, n.48, 92 S.Ct., at 2754, n.48 (Brennan, J., concurring).

Consideration of remaining aggravating factors under the Georgia statute does nothing to alleviate these doubts. Thus, one finds that the first aggravating factor under the statute ("the offense . . . was committed by a person . . . who has a substantial history of serious assaultive criminal convictions") was declared unconstitutionally vague by the Georgia Supreme Court. *Arnold v. State,* 236 Ga. 534, 540, 224 S.E.2d 386 (1976). Obviously, then, no guidance can be found in it. It is only a little less difficult to see how the fact that a homicide was committed "in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person," § 27-2534.1(b)(3), can be seen as "rationally" directing a jury where the statute does not similarly list the killing of more than one person as an aggravating factor. Indeed, the proposition that two murders are generally worse

than one would seem utterly unassailable, but it is curiously absent from the Georgia statute.[2]

The remaining factors seem no more helpful. Only (b)(7), which has already been discussed at length, and (b)(6), which describes murder by means of or in the role of an agent, do not relate specifically to homicides committed against judicial or police officials, or by an escaping criminal. Of course, (b)(7) was held in *Godfrey* to provide effectively no guidance for a jury. Section (b)(6) may be seen as more specific but it would surely prove inapplicable to many crimes as would factors relating to homicides by escapees or against public officials. At best, these guides would seem to provide only limited assistance in some quite possibly small number of factual contexts.

In light of all these problems, it is perhaps not surprising that the endorsement of the Supreme Court was less than ringing:

> While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that can be fairly called capricious or arbitrary.

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2. Some states do in fact make multiple murder an aggravating factor as such. Interestingly, had Georgia followed this policy, the problem of (b)(7) might not have arisen in *Godfrey,* 446 U.S., at 432, n.15, 100 S.Ct., at 1767, n.15. This Court particularly questions the "rationality" of a statute which so easily supports Furman's sentence for an "accidental" killing, yet cannot constitutionally reach the "hideous" double murder about which Godfrey declared, "I have been thinking about it for eight years . . . I'd do it again." 446 U.S., at 426, 100 S.Ct., at 1763.

428 U.S., at 194-95, 96 S.Ct., at 2935 (Stewart, Powell, and Stevens, JJ.).[3] Thus, the Court appears to find the Georgia statute better than nothing at all. Nonetheless, this Court must seriously wonder whether the Georgia statute in fact amounts to more than a mere random enumeration of factors, which would be entirely inapplicable in many arguably extreme cases and entirely obvious in others.[4] Certainly, there would seem to be nothing particularly novel or interesting in a statutory requirement that the crime and the criminal be considered by a sentencing jury. Such an admonition forbids only mandatory sentencing. It does not in any apparent way prevent or control the problem of arbitrary imposition of the death penalty. Indeed, it would appear that these broad, overlapping factors would not merely authorize but invite imposition of the death penalty in many cases where an undirected jury would be most reluctant to impose death. Of course, this view is consonant with the historical fact that statutory formulations have generally included many more cases than juries have been willing to recognize.

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3. This quotation relates specifically to a set of factors developed by ALI for the Model Penal Code (Tent.Draft No. 9, 1959). However, it would seem applicable to the Georgia statute, which is similar in many respects. See 428 U.S., at 193, n.44, 96 S.Ct., at 2934, n.44.

4. There is no doubt that the court recognized that this problem might exist:

> A system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur.

428 U.S., at 195, n.46, 96 S.Ct., at 2935, n.46. Nonetheless, the Court does not much consider whether the Georgia statute fails on this account.

IV

Whatever the possible benefits of these statutory instructions standing alone, they must ultimately be considered in the light of the third level of protection afforded the accused under *Furman:* appellate review of the decision to impose the death penalty. Much as with the statutory aggravating circumstances, *Gregg* finds cause for comfort in the Georgia provision for automatic review by the State Supreme Court:

> That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases . . . [T]o guard against a situation comparable to that presented in *Furman,* the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate.

428 U.S., at 198, 96 S.Ct., at 2937 (Stewart, Powell, Stevens, JJ.). The Supreme Court thus concludes that the Georgia procedures are constitutional "on their face."

This Court has already touched on the enormous problems inherent in review of "similar cases" in *Moore.* As I indicated there, it is no simple task to identify what cases are in fact "similar" for purposes of sentencing review. Because the trial judge was extraordinarily careful to note explicitly the basis of his determination, it was possible in *Moore* to classify that case as a "residential murder" and to compare it with other cases accordingly. Obviously, had this guidance been unavailable, as it would be with any jury, no court could have said with assurance that the site of the crime was controlling. It would have been possible

only to consider Mr. Moore's case in some much more general context, with a result that might or might not have been the same.

This problem is obviously very broad. The state tribunal is commanded to consider the accused as "uniquely individual human beings." *Woodson v. North Carolina,* 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (Brennan, J., concurring). This truism nothwithstanding, it must also find "similar cases" and thus reach "similar results." Murder is by its very nature and definition a gross and extraordinary aberation from the norms of civilized conduct. It would therefore seem to be among the least likely of all phenomena to admit to easy or useful classification. How often, for example, can a jurisdiction be expected to confront a homicide such as this one:

> [T]he victim had been disemboweled and a butcher knife with a 12-inch blade was plunged into the unclothed upper part of her body. Her internal organs had been removed. She suffered 44 separate stab wounds in the trunk and chest....

Fulghum v. State, 246 Ga. 184, 269 S.E.2d 455 (1980). How frequently may a state find a crime such as this:

> At the time of her death, the nine months old child weighed 5½ pounds, had 2 rib fractures, parts of her lungs had begun to collapse, and she was so severely malnourished and dehydrated that her liver had been damaged, her skin had dried and wrinkled from a loss of underlying fatty tissue and her abdomen had swollen and was distended. Further she had wounds of unknown origin in various stages of healing on her head, face, neck, back, chest, genital area, legs and arms.

Lackey v. State, 246 Ga. 331, 271 S.E.2d 478 (1980). These two cases, drawn from the most recent volume of the Georgia Reporter, may suggest the truely extraordinary

ranges of depravity which must be filled before any comparison of "similar cases" is possible. Moreover, the fact that neither *Lackey* nor *Fulghum* resulted in the death penalty should only reinforce this conclusion.

It is obvious then that the requirement that "similar cases" be considered creates enormous practical difficulties when the extraordinary range of human depravity encompassed under the term "homicide" is considered. But, nonetheless, this fact is probably the least significent problem in a proportionality review. Much more difficulty is apparent in the initial process of characterizing the case to be compared. As was suggested in *Moore* earlier, there is simply no "rational" basis for choosing between such views. This problem has already been detailed with respect to *Godfrey,* but other examples are readily available. Thus, one sees no "objective" way to decide whether a proportionality review in *Fulghum* should focus on the extraordinary facts quoted above, or other, perhaps equally extraordinary points which could have been cited:

> [A]ppellant had a religious obsession concerning the devil and had at various times attempted to pull his eyes out and kill himself . . . Family members testified concerning appellant's religious obsessions and various hospital commitments. Dr. Lloyd T. Baccus, a psychiatrist, who examined appellant under a court order, concluded that appellant was a paranoid schizophrenic, chronic type. It was his opinion that appellant had attempted to convert Ms. Pirrie and then had seen her as a personification of Satan. This had lead to appellant's act of murder....

246 Ga., at 185, 269 S.E.2d 455. On such a record, this Court can see no way to characterize the crime which could not fairly be termed an "arbitrary and capricious" choice. Certainly, this Court would find little guidance in commen-

taries like the remark of *Godfrey* that "[a]n interpretation of § (b)(7) so as to include all murders resulting in gruesome scenes would be totally irrational." 446 U.S., at 433, n.16, 100 S.Ct., at 1767, n.16 (Stewart, Blackmun, Powell, Stevens, JJ.).

The problems inherent in proportionality review are not merely matters of definition. Even were it possible to know which, among the many facts of a particular case, were determinative, and, even were it also possible to identify a sample of "similar cases," it would still be necessary to find some pattern to follow. However, the central thesis of *Furman* is that juries had, to that time, failed to follow any pattern at all. *Furman,* of course, characterizes prior jury sentencing as "freakish" and based on mere "whim," which admitted no rational distinction. *See, e. g.,* 408 U.S., at 294, 92 S.Ct., at 2754. Thus, no constitutional pattern can possibly be expected in this pre1972 law. Moreover, if such a pattern were ever to be devised, it would surely require some profound change in jury behavior under the new statute. Additionally, these changes would need years to become apparent and to be applied to a sample of situations broad enough to support meaningful appellate review. There is simply no basis whatever for believing that sentencing procedures have changed significantly in Georgia since the current statute was enacted. *See* Bowers and Pierce, Arbitrariness and Discrimination Under Post-*Furman* Capital Statutes, *Crime & Delinquency,* 563 (October, 1980); *see also* Dix, Appellate Review of the Decision To Impose Death, 68 Geo. L.J. 97 (1979). Moreover, there was certainly no significant moritorium on imposition of capital punishment after *Furman* to allow such patterns to appear. Thus, it can hardly be surprising that *Moore v.*

State, decided in 1974, relied *inter alia* on several pre-*Furman* cases. *See, e. g., Callahan v. State,* 229 Ga. 737, 194 S.E.2d 431 (1972).

In sum, it appears to this Court that the procedures mandated by *Furman* do not now and in fact never will achieve the standard set out in that opinion and succeeding cases. It is apparent from even the brief review undertaken here that the Georgia statute in particular falls well short of the monumental intellectual breakthrough which has eluded draftsmen through most of Anglo-Saxon political history. Far from guiding juries to rational choices, the statute merely catalogues a laundry list of considerations which would be obvious to any jury considering an appropriate case, but provide little, if any, real basis for their determination. Moreover, even were these factors adequately developed, there is little reason to conclude that any rational pattern might be divined given the enormous variety of factual patterns in homicide cases and the impossibility of determining which supported the jury's verdict. Finally, of course, there is simply no reason for believing that any such patterns exist or could exist, at least so long as the Supreme Court continues to sanction "arbitrary and capricious" decisions *not* to impose the death penalty. *See, e. g., Gregg, supra.*

V

This discussion is certainly general and preliminary. But, I believe it sufficient to support several broad comments. In the first place, one can appreciate the profound difficulty facing state legislatures and judiciaries in developing and applying capital sentencing statutes. As *McGautha* demonstrates, centuries of effort in innumer-

able different social and political contexts have failed to devise any system which separates homicides worthy of capital punishment from those meriting a lesser penalty. In fact, if juries are to be regarded as the "conscience of the community" in these determinations, it appears that no statute can be drawn narrowly enough to divine the very unusual circumstances where death is to be considered appropriate. The modern requirement that statutes further narrow even this limited range of cases seems if anything less feasible than prior efforts.

Against this broad historical backdrop, the Georgia law cannot be seen as a legislative failure, so much as still another reflection of the impossibility of the task. Similarly, the failings of the Georgia Supreme Court as outlined here in *Moore,* as well as in *Godfrey,* would appear to be inevitable. The state judiciary can hardly be faulted for not following patterns which do not now exist and never have. Nor can the state courts be faulted for failing to properly characterize particular cases or types of cases, when such questions of definition are, in overwhelming part, subjective matters which admit no *legal* solution.

If present law mandates the impossible from state judicial systems, it places the federal tribunal in no better position. Once general due process requirements, such as those found determinative in *Blake,* are met, and the more specific procedural requirements of capital sentencing are satisfied, as they were not in *Burger,* the federal court is forced to the brink of the extraordinary proportionality

analysis which was necessary in *Moore.*[5] Inevitably, such an analysis forces the federal court "continuously to question every substantive decision of the [state] criminal justice system with regard to the imposition of the death penalty." *Spinkellink, supra,* at 604.

If, as this Court suspects, it is becoming obvious that the states *cannot* meet the requirements of *Furman* no matter how careful their efforts,[6] federal tribunals will be forced into wholesale second-guessing of verdicts which were arrived at in good faith, upon competent evidence, and at no little cost in public and private resources, to say nothing of the strain placed upon conscientious jurors in their "awesome determination." Moreover, such developments would also bring enormous "friction" to the federal system as well as between the courts and the general public, "friction" which is itself grossly disproportionate to the wretched, demented lives that often hang in the balance. Obviously, if the Constitution does mandate the impossible, the public should be informed so that their laws—or the Constitution—can be adjusted accordingly. If, upon further reflection, it appears that the Constitution does not mandate all the requirements of *Furman,* this, too, must

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5. Of course, *Spinkellink* suggests that proportionality analysis can be avoided where there is no reason to believe that the state courts are not properly following a constitutionally drawn statute. However, as has been pointed out here, there is good reason to doubt that Florida, or Georgia, or any state can follow the dictates of *Furman. See* Dix, *supra.*

6. Considering the very significant similarity between the crimes in *Furman* and *Moore,* it would seem that, if Georgia *is* following its statute properly, the exercise may be largely meaningless in any event.

be made clear. The resources of the federal judiciary are far too limited and the stature of the judicial branch far too hard-earned and too fragile to be dissipated in futile demands that the states somehow achieve the impossible.

VI

Among the more extraordinary results of *Furman* and its progeny is to bring unity to the views of two of the Supreme Court's most ideologically distant members. Thus, in *Woodson v. North Carolina, supra,* Justice Rehnquist concludes in dissent that

> it is not at all apparent that appellate review of death sentences, through a process of comparing the facts of one case in which a death sentence was imposed with the facts of another in which such a sentence was imposed, will afford any meaningful protection against whatever arbitrariness results from jury discretion. All that such review of death sentences can provide is a comparison of fact situations which must in their nature be highly particularized if not unique, and the only relief which it can afford is to single out the occasional death sentence which in the view of the reviewing court does not conform to the standards established by the legislation.

428 U.S., at 316, 96 S.Ct., at 2997. As for the efficacy of those standards, Justice Rehnquist echoes the logic of *McGautha* that development of meaningful standards lies "beyond present human ability." 428 U.S. at 320, 96 S.Ct., at 2998, *quoting McGautha, supra,* 402 U.S., at 204, 91 S.Ct., at 1465.

Five years later, concurring in *Godfrey,* Justice Marshall, while adhering to his view that the Constitution forbids "arbitrary" infliction of the death penalty, nonetheless concluded that "the Court in *McGautha* was substan-

tially correct in concluding that the task of selecting in some objective way those persons who should be condemned to die is one that remains beyond the capacities of the criminal justice system." 446 U.S., at 442, 100 S.Ct. at 1772. Furthermore, Justice Marshall concludes, based on a variety of factors, that appellate courts are probably "incapable of guaranteeing the objectivity and even-handedness that the Court contemplated and hoped for in *Gregg.*" *Id.,* at 439, 100 S.Ct., at 1770.

Of course, this agreement on the current state of the law certainly does not extend to a common prescription of the solution. But, it does perhaps signal the possibility of some change. Other facts also point to the likelihood, if not the necessity, for a serious reassessment of the *Furman* approach. Two are obvious here. In *Gregg,* the Supreme Court cites *Moore v. State, supra,* for the proposition that mitigating factors ("his youth, the extent of his cooperation with the police, his emotional state at the time of the crime," 428 U.S., at 197, 96 S.Ct., at 2936 (quoted above)), are to be considered. In fact, *Moore* displayed *all* these mitigating factors and others as well. Yet, the death penalty was sustained.

Second, in *Godfrey,* the Supreme Court avoided the conclusion that (b)(7) had never been effectively limited in Georgia by abstracting several propositions from the Georgia case law. This discussion included *inter alia* the observation "derived from *Blake* alone . . . that the word 'torture,' must be construed *in pari materia* with 'aggravated battery' so as to require evidence of serious physical abuse of the victime before death." 446 U.S., at 431, 100 S.Ct., at 1766 (Stewart, J.) (footnote omitted). In fact, the trial court's report in *Blake* specificaly indicates that the

victim was *not* physicaly harmed or tortured in any way. Thus, even if the Georgia Supreme Court can be credited with the proposition derived from *Blake,* this proposition has not been followed even with respect to Mr. Blake himself. *See also* 446 U.S., at 436, 100 S.Ct., at 1768 (Marshall, J., concurring).

I will not attempt to specify here by notion of the ultimate or proper outcome of a reevaluation of *Furman.* However, several points are clear from *Blake, Burger,* and *Moore.* First, it does not seem possible to completely eliminate proportionality review. *Moore* demonstrates that some judicial role is essential, if only so that the judiciary may correct its own mistakes. Extreme cases like *Moore* do indeed "shock the conscience." Moreover, because specific factual findings can be available, this review need not be perfunctory or unguided. Similarly, this Court believes that an occasional jury determination may be the proper subject for appellate reversal where no rational basis for the sentence of death can be divined. Thus, the major contribution of *Furman* may in restrospect be the conclusion that evolving standards of society now limit capital punishment to "a small number of extreme cases." *Gregg, supra,* 428 U.S., at 182, 96 S.Ct., at 2929 (Stewart, Powell, and Stevens, JJ.). A defendant may be due the benefit of this development, and reviewing courts may perhaps properly decline to sanction a death sentence where no rational trier of fact could place the crime or the criminal at this extreme. *Jackson v. Virginia,* 444 U.S. 890, 100 S.Ct. 195, 62 L.Ed.2d 126 (1979). *See also Godfrey, supra,* 446 U.S., at 451, 100 S.Ct., at 1776 (White, J., dissenting).

To be sure, this standard is vague. But, nonetheless, it is a judicial standard and a judicial approach. At the

least, it spares other reviewing courts the extraordinary role of connoisseur of blood and dementia which necessarily accompanies the comparative analysis approved in *Gregg* and conducted here in *Moore.* Of course, visions of comparing "similar cases" and discovering "patterns" of sentencing have the seductive appeal of science and mathematics. But, as Justice Harlan observed, this appeal is illusory. There is no objective way to describe "the case" at hand. There are no "similar cases," and there is no constitutional sentencing "pattern." On the other hand, applied with due care and circumspection, a *limited* judicial standard offers the opportunity for meeting the occasional, exceptional situation where imposition of the death penalty might amount to an error of constitutional dimensions. This limited role is not merely all that an appellate or habeas court should play; it is the only role these courts *can* play. "Such is the human condition." *Spinkellink, supra,* at 605.

OPPOSITION BRIEF

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

No. 85-188

RALPH KEMP, WARDEN
GEORGIA DIAGNOSTIC AND
CLASSIFICATION CENTER,

Petitioner,

v.

JOSEPH JAMES BLAKE,

Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RALPH KEMP, Warden,	*	
Petitioner,	*	
	*	
v.	*	No. 85-188
	*	
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Respondent	*	

RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

STATEMENT OF THE CASE

Joseph Blake[1] is a young black man who lived in Savannah, Georgia. He was the fiancee of Jacquelyn "Jackie" Loury[2], an 18 year old woman who was the mother of Tiffany Loury, the two year old victim (T. p. 16). This relationship between Blake and Jackie had existed for some nine months. Early in the afternoon of November 14, 1975, Blake visited Jackie at her home. Jackie wanted some money, however Blake at that time could not give Jackie any money as he had to make a monthly child support payment for a child by a previous marriage and feared he would not have enough money for Jackie (T. p. 34). Nevertheless, Blake wanted Jackie to go out with him on this evening. She declined to go with him because she had plans to go barhopping with a female companion (T. p. 37). Blake's real fear was that Jackie had plans with another man. Distraught as Blake was, he gave Jackie a few dollars for the barhopping venture. Blake was persistent in his quest to be with Jackie, so he met her at the home of her friend. As a compromise, they all decided to go to the Silver Fox Lounge together. They began drinking and, during the evening, by most accounts, Blake drank a half pint of vodka, shared three quarts of beer at the Silver Fox Lounge, later shared two quarts of beer at Bob's Lounge; and then drank a dollar bottle of wine (T. pp. 25, 26, 27, 170). During the evening Blake carefully guarded Jackie from what he thought was going to be a rendevous with another man (T. pp. 168, 170). At Bob's Lounge, Blake "boxed" Jackie up against the side of her head, after which she broke a beer bottle and came at him (T. p. 51). A female lounge employee directed him to leave the bar, which he did. He later slipped back in the bar and tried to talk things out with Jackie. Once again, the female lounge employee directed him out.

Blake then went to Tiffany's home; she had gone to bed, but when awakened, agreed to go with him. Tiffany had developed an attachment for Blake and on previous occasions had gone with him to play with his young nephew (T., pp. 38, 39, 137, 173). It was not unexpected or unusual that Tiffany would go out with Blake. This is indicated by Blake's conversation with Tiffany's grandmother later in the evening. At about 1:00 a.m., Blake called Tiffany's grandmother, and informed her that he had taken Tiffany. Mrs. Smith, the grandmother, scolded him for having the child out so late on a cold evening, but having the child, in and of itself, was not a major concern.

Blake felt that Jackie, who he loved, was a bad influence on the child and should not be allowed to raise Tiffany (T. pp. 96, 114). He became convinced that the resolution of his and the child's problems was for them to leave this world and to go to "another world" on the "other side" (T. p. 175).

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[1] ...ph Blake is called "Blake" by his friends.

[2] ...quelyn Loury is called "Jackie" by her friends.

Tiffany and Blake drove around for a while and eventually stopped along the middle of the Talmadge Memorial Bridge (T. p. 175). He and the child prayed together and prepared to enter "another world" (T. p. 175). Blake then asked the child if she would like to go with him forever and she replied yes (T. p. 175). He said that she would go first and that he would soon be with her (T. p. 175). He then dropped the child from the bridge to the river some hundred or more feet below. The child died either on impact or shortly thereafter (T. pp. 45-46). The state court trial judge found no torture or aggravated assault before the child's death.

After dropping the child from the bridge, Blake first called the victim's grandmother and then tried to inform the police of what had happened to Tiffany (T. pp. 71, 80). At first the police would not believe that he committed the act (T. p. 80); only after he took the police to the bridge and showed them the point where the incident occurred was he believed (T. p. 140).

He was arrested and gave the police a statement that described his actions and further stated:

> All I know is I did wrong and in another way I did right. At least the baby don't have to suffer about it because the mama and the real father ain't fit to have a child like that. The baby is too good for any one of us. She is in a better place now.

Two or three days after his arrest and original statement, he attempted to commit suicide with a noose made from a torn mattress cover. His suicide note was as follows:

> To Whom That Every Read This Letter, I have done the right thing by turning myself in, but I have a promise to keep to my little girl Tiffany. I told her that I would join her soon. But now the time has come for me to go to her. She came to me and said she wanted me now. So I must go because I promised Tiffany and I love her. That we'll be together on the other side. So you see and understand that I never lost her cause she is wait for me. I'm just sorry that Jackie won't be there with us. Me and Tiffany will live in peace now forever. I will go to her now. May god forgive me for all my sins. Joseph James Blake.

Some two weeks later, the trial court ordered a psychiatric examination of Blake. Following the then current policy for indigent defendants in Chatham County, Blake was taken to Central State Hospital in Milledgeville, Georgia, for examination in the state-operated facility for the criminally insane. The stated purpose of this examination was to determine: (1) the defendant's psychiatric condition at the time of the crime; (2) whether the defendant was competent to stand trial; (3) recommendation for treatment; (4) any mitigating circumstances which might be present.

A police report describing the incident was given to Dr. Bosch, a psychiatrist at the state facility. However, neither the taped confession nor the handwritten suicide note was given or revealed to the psychiatrist to aid him in his examination, although they were in the hands of the State when the psychiatrist was appointed by the court. Further, neither the confession nor suicide note was given to defense counsel, nor was he made aware of their existence until the day before the trial.

Without this information and because of Blake's lack of memory at the time of the psychiatric examination, the psychiatrist's report contained the following:

> That as far as his condition of the alleged offense, I do not have an opinion. I didn't say that he was sane or insane. I said I don't have an opinion because I couldn't get any information from him. He claimed he had no memory of doing anything wrong. He said he lacked memory about the particular incident. And then for that reason I could not formulate an opinion about his condition at the time of the offense.

The only issue in the trial was Blake's sanity, or lack thereof, at the time of the act. The court proceeded to trial with no psychiatric evidence on that point.

REASONS WHY THE PETITION FOR
WRIT OF CERTIORARI
SHOULD NOT BE GRANTED

I.

The Circuit Court Below Properly Determined the Right of an Indigent Defendant to a Psychiatric Examination Where Sanity Was Seriously At Issue.

The sanity of the Respondent at the time of the offense was a serious issue in this case. The Circuit Court below recognized the right of an indigent criminal defendant to one psychiatric examination that fairly addressed this issue of the trial. The Circuit Court did not establish a new rule, as the Warden bemoans; it simply followed this Court's decision in Ake v. Oklahoma, ___ U.S. ____, 105 S.Ct. 1087 (1985).

There is no dispute between the parties as to the events surrounding the death of the two year old victim in this case. Respondent first intended to run away with the infant and then decided that he and the child should go to "another world". He stopped on a bridge and prayed with the child about being together forever "on the other side". After telling authorities of his act and while in custody, Respondent continued to hallucinate and tried to hang himself with a noose fashioned from his mattress cover. It is clear that the jury needed the assistance of an expert on the issue of Respondent's sanity at the time of the offense.

II.

Procedural Default Was Not an Issue In the Circuit Court Below

Petitioner-Warden in this Court raises the issue of procedural default. The Petitioner-Warden has raised this issue as to only one of the two grounds upon which Respondent received relief in the Circuit Court below. This issue of procedural default was neither raised nor briefed by Petitioner-Warden in the Circuit Court below; it is therefore jurisdictionally barred from being an issue available for review by certiorari. The Petitioner-Warden cannot initiate a new issue in his petition for writ of certiorari.

III.

The Circuit Court Below Correctly Decided the Ineffective Assistance of Counsel Issue Under the Strickland v. Washington standard.

Trial counsel for Respondent presented no evidence on Respondent's behalf during the penalty stage of trial, failed to do any preparation for the penalty stage; did not investigate potential evidence; and neither interviewed nor contacted witnesses to testify in mitigation. There was a host of available mitigating evidence that could have been presented for Blake at the penalty phase of the trial.

The Circuit Court below recognized that Strickland v. Washington, ___ U.S. ___, 104 S.Ct 2052 (1984), had not been decided at the time of the District Court's decision in this case, and reviewed the District Court's finding of fact with circumspection.

The Circuit Court's decision clearly indicated its correct understanding of Strickland.

This decision in part states:

> As noted earlier, the Supreme Court's opinion in Strickland v. Washington enunciated a two-part test which must be applied in judging whether defense counsel's errors amounted to ineffective assistance of counsel. 104 S.Ct. at 2064. We do not hesitate in agreeing with the district court that Blake has satisfied the first part of the test. It should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness.
>
> This is not the end of the inquiry, for Blake must also demonstrate that he was prejudiced by his attorney's conduct. The district court determined that Haupt's error was prejudicial per se and that even if prejudice needed to be affirmatively proved, Blake had adequately shown that Haupt's ineffectiveness was prejudicial: '[n]evertheless, petitioner has made a credible, if hardly overwhelming, showing of prejudice.' 513 F.Supp. at 780.
>
> However, because the district court was without the benefit of Strickland, we must reexamine this conclusion in light of that case's holding.
>
> (Petitioner's Appendix, pp. 22-23).

CONCLUSION

Respondent Blake, for the reasons stated above, prays that the Warden's petition for writ of certiorari be denied.

Respectfully submitted,

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Joseph M. Nursey

COUNSEL FOR RESPONDENT

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CERTIFICATE OF SERVICE

I hereby certify that I have served counsel for the opposing party with a copy of the foregoing pleading by placing same in the United States Mail with adequate first-class postage attached thereon addressed to Mr. Michael J. Bowers, Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, Georgia 30334.

This 3rd day of September, 1985.

Millard C. Farmer
Counsel for Respondent

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OPINION

SUPREME COURT OF THE UNITED STATES

RALPH KEMP, WARDEN *v.* JOSEPH JAMES BLAKE

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 85-188. Decided November 18, 1985

The petition for writ of certiorari is denied.

JUSTICE WHITE, dissenting.

This case presents the question of whether, in a habeas corpus proceeding presenting multiple claims for relief, an appellate court has jurisdiction to review an order of the district court without disposing of all of petitioner's claims. In his habeas petition to the district court, petitioner presented 59 constitutional claims. The district court found that three of these claims had merit and granted the writ, but expressly refused to rule on the remaining claims. On appeal, the Eleventh Circuit originally held that, because the district court's order did not finally determine all of the claims presented in the habeas petition, under Fed. Rule Civ. Proc. 54(b)[1], there was no final judgment, and therefore, the court was without jurisdiction to consider the appeal under 28

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[1] Fed. Rule Civ. Proc. 54(b) provides as follows:

(b) *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

U. S. C. § 1291.[2] *Blake* v. *Zant*, 737 F. 2d 925, 928 (1984). On *sua sponte* reconsideration, however, the court determined that a district court order granting a writ of habeas corpus is a final judgment within the meaning of § 1291, regardless of the district court's refusal to consider the remainder of petitioner's claims. *Blake* v. *Kemp*, 758 F. 2d 523, 524–525 (CA11 1985).

This later decision of the Eleventh Circuit conflicts with the practice of the Eighth Circuit. That court has held that, when a district court grants habeas relief to a petitioner on some but not all of the claims presented for consideration, the Court of Appeals does not have jurisdiction to review the trial court's decision unless its order also finally disposes of the remainder of petitioner's claims. *Stewart* v. *Bishop*, 403 F. 2d 674, 679–680 (1968). See also *Gray* v. *Swanson*, 430 F. 2d 9, 11 (CA8 1970) (Rule 54(b) applies to prohibit appeals when fewer than all habeas claims are finally determined by the district court's order, but finding all claims to have been decided). Given this direct conflict among the Courts of Appeals, I would grant certiorari in this case.

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[2] 28 U. S. C. § 1291 provides, in pertinent part, as follows:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . .